United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR PETITIONER 220 TELEVISION, INC.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

362

No. 17,356

220 TELEVISION, INC.,

Petitioner,

v.

UNITED STATES OF AMERICA
and the
FEDERAL COMMUNICATIONS COMMISSION,

Respondents,

AMERICAN BROADCASTING-PARAMOUNT THEATRES, INC.,
SIGNAL HILL TELECASTING CORPORATION,

Intervenors.

On Petition for Review of a Report and Order
of the Federal Communications Commission

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STATEMENT OF QUESTIONS PRESENTED

As set out in the prehearing stipulation of the parties approved by the Court on November 28, 1962, the questions presented in this case are:

1. Whether by assigning television Channel 2 to St. Louis, Missouri, rather than to Salem-Rolla, Missouri, the Federal Communications Commission acted inconsistently with Section 307(b) of the Communications Act, which requires that the Commission make a fair, efficient and equitable distribution of broadcast service.

2. Whether the Commission relied improperly upon the existence of service from Station KTVI on Channel 2 in St. Louis in view of the determination that the original Commission decision assigning Channel 2 to St. Louis was invalid and in view of the fact that this Court in Sangamon Valley Television Corp. v. United States, ___ U.S. App. D.C. ___, 294 F.2d 742 (1961), and, thereafter, the Commission, held that the question of the assignment of Channel 2 was to be considered de novo in an entirely new proceeding.

3. Whether the Commission disregarded a representation by 220 Television, Inc., that it would build and operate a station on Channel 2 in Salem-Rolla, and whether it held, without basis in the record, that this single VHF channel could not be put to effective use in or near the "relatively small" community of Salem, but that instead the residents of that area should in their admitted need for television service rely upon the potential utilization of three UHF channels which are assigned but unused in the area, and, if so, whether this was reversible error.

4. Whether the Commission erred in holding that there was no merit to the claim of 220 Television, Inc. that the St. Louis television market cannot support four commercial television stations.

5. Whether the Commission's decision was otherwise lacking in adequate support in its opinion or the record, or in any other respect was arbitrary or capricious.

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BRIEF FOR PETITIONER 220 TELEVISION, INC.

JURISDICTIONAL STATEMENT

The petition herein seeks review of that part of a report and order of the Federal Communications Commission (R. 628-50), adopted on July 18, 1962, in which the Commission assigned VHF Channel 2 to St. Louis, Missouri and refused to assign it to the area

of Salem-Rolla, Missouri, which is now without local television service. 220 Television, Inc. had asked that the channel not be assigned to St. Louis, but that instead it be assigned to Salem-Rolla (see R. 321-34).

Pursuant to the venue provisions of Section 3 of the Judicial Review Act of 1950 (5 U.S.C. 1033), the petition was originally filed, on September 12, 1962, in the United States Court of Appeals for the Eighth Circuit. On September 26, 1962, that Court, on consideration of a motion of respondents and pursuant to the provisions of 28 U.S.C. 2112, ordered the proceeding transferred to the United States Court of Appeals for the Seventh Circuit where a prior proceeding[1] had been instituted with respect to the Commission's report and order and where the Commission record had been filed.

On October 22, 1962, the Court of Appeals for the Seventh Circuit issued an order transferring both petitions to this Court, noting that the petitions involved "the same subject matter that was before the District of Columbia Circuit in 1958, Sangamon Valley Television Corp. v. United States, 255 F.2d 191."

Jurisdiction of this proceeding is vested in this Court by Section 402(a) of the Communications Act of 1934, as amended (47 U.S.C. 402(a)), and Section 2 of the Judicial Review Act of 1950 (5 U.S.C. 1032).

STATEMENT OF THE CASE

1. Background

On April 11, 1952, the Commission adopted its so-called Sixth Report and Order (17 Fed. Reg. 3905; Vol.I (Part 3) Pike & Fischer RR 91:599) in which was established the basic table of assignments for

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[1] That was Sangamon Valley Television Corp. v. United States, which is now Case No. 17,380 in this consolidated proceeding. Sangamon challenges the removal of Channel 2 from Springfield, Illinois and its assignment to St. Louis and to Terre Haute, Indiana. 220 Television, Inc. has taken no position as to whether Channel 2 should be assigned to Springfield or Terre Haute, since either assignment would be consistent with assigning the channel to Salem-Rolla.

the nationwide television system now in existence. The twelve VHF and the seventy UHF television channels available for television broadcasting were assigned on an intermixed basis throughout the nation, with Springfield, Illinois being assigned VHF Channel 2 and UHF Channels 20 and 26; Channel 26 was reserved for non-commercial educational use. St. Louis, Missouri was assigned three VHF channels for commercial use, one VHF channel for educational use, and three commercial UHF channels. VHF Channel 10 and UHF Channels 57 and 63, with Channel 57 reserved for educational broadcasting purposes, were assigned to Terre Haute, Indiana. The city of Rolla, Missouri was assigned a single UHF commercial channel.

The ability of UHF stations to compete and thrive in this intermixed system was soon seen to be dubious at best, however, with the result that full achievement of the Commission's basic allocations objectives as set out in the Sixth Report and Order[2] was imperilled. See Second Report on Deintermixture, 13 Pike & Fischer RR 1571 (1956). Accordingly, the Commission inaugurated a long-range program designed to improve the basic television allocation structure. At the same time, while awaiting a long-term solution to the general problem, it adopted a policy of selective deintermixture of VHF and UHF assignments in particular communities as an interim program designed "to improve the opportunities for effective competition among a greater number of stations" (id. at 1581). Toward that end it instituted separate proceedings looking toward the deintermixture of thirteen different

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[2] "Briefly stated, those objectives were to encourage the development of a nationwide, competitive television system in which:
(a) All areas would have at least one service;
(b) The largest possible number of communities would have at least one local television station; and
(c) Multiple services would be available in as many communities and areas as possible to provide adequate program choice to the public and encourage the development of competition—among broadcasters, networks and other elements of the industry." Second Report on Deintermixture, 13 Pike & Fischer RR 1571, 1572 (1956).

communities, including Springfield, Illinois, and the reassignment of any VHF channels deleted as a result of deintermixture. It was in the proposal in 1956 to delete VHF Channel 2 from Springfield, Illinois, and to reassign it to St. Louis, Missouri as that city's fifth VHF channel and to Terre Haute, Indiana as its second VHF channel that this proceeding had its inception.

2. The 1957 Report and Order

On February 26, 1957, after a proceeding on this proposal, the Commission adopted a Report and Order (15 Pike & Fischer RR 1525 (1957)) deleting VHF Channel 2 from Springfield, Illinois and reassigning it to St. Louis and Terre Haute.[3] Concurrently, it authorized Signal Hill Telecasting Corporation, until that time operator of a station on UHF Channel 36 in St. Louis, to operate "temporarily" on Channel 2 in that city pending final Commission action on an application for regular operation on that channel or the issuance of a final decision in any comparative hearing between competing applicants for Channel 2 in St. Louis.[4]

In deciding to deintermix Springfield, the Commission noted, inter alia, that (1) no persons would lose the service of a Channel 2 station there, because the conditional grant of a Channel 2 permit at Springfield was not yet represented by a station on the air; (2) the Springfield area was "predominantly UHF in the sense that a number of UHF stations are presently operating there and relatively little VHF service invades the area" (id. at 1529); and (3) if Channel 2 were employed in both St.

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[3] The Commission's minimum mileage separation requirements with respect to stations operating on the same channel prohibit the assignment of Channel 2 to both St. Louis, Missouri, and Springfield, Illinois. Rules and Regulations, Section 3.610.

[4] The Commission stated (15 Pike & Fischer RR at 1537) that these "extraordinary procedures" were necessary in order to provide a "continuing service to the people of St. Louis." It noted that Signal Hill supported "the proposal to add a VHF channel, and indications are that the UHF station could not survive the advent of the third commercial station" (id. at 1535). At the time, there were only two commercial stations and one educational facility, in addition to Signal Hill's operation, on the air in St. Louis. Channel 11, ultimately awarded to 220 Television, Inc. in 1959, was then involved in a comparative hearing.

Louis and Terre Haute "an area of about 308 square miles containing almost 3,000 persons would receive a first Grade B service" (id. at 1531).

The Commission rejected a counter-proposal advanced by the operator of a VHF station in Terre Haute, Indiana, that Channel 2, if deleted from Springfield, should be reassigned to Salem, Missouri and Salem, Illinois. The Commission said that it appreciated that these two cities were without local outlets or service, but denied the proposal on the ground that no parties had indicated that they would apply for Channel 2 in Salem, Missouri or Salem, Illinois and there was no other indication that communities of such size could make effective use of the frequencies. Accordingly, the Commission stated, since it was rejecting the Salem proposal, "coverage data with respect to this proposal is not discussed in detail" (id. at note 7, 1533).[5]

The only appeal from the Commission's 1957 report and order was taken by Sangamon Valley Television Corporation.[6] As an applicant for VHF Channel 2 in Springfield it was concerned only with the validity of the deintermixture aspect of the case and it raised in its petition for review no question concerning the Commission's rejection of the alternative proposal to reassign Channel 2 to Salem, Missouri and Salem, Illinois. This Court in a per curiam opinion held that the deintermixture of Springfield did not violate Section 307(b) of the Communications Act requiring the Commission to provide a fair, efficient, and equitable distribution of radio services among the several states and communities. Sangamon Valley Television Corp. v. United States, 103 U.S. App. D.C. 133; 255 F.2d 191 (1958).

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[5] Another proposal, that Channel 2 be assigned to Cape Girardeau, Missouri, as that city's second VHF outlet, was rejected on the ground that Section 307(b) of the Communications Act required that St. Louis be assigned its fourth commercial channel "before the relatively small city of Cape Girardeau is assigned a second VHF outlet" (id. at 1535).

[6] As already indicated, 220 Television, Inc. was at this time involved in a comparative hearing concerning VHF Channel 11 in St. Louis and did not participate in the original Springfield deintermixture proceeding.

3. The Ex Parte Case

Sangamon Valley thereupon filed a petition for a writ of certiorari with the Supreme Court. While that petition was pending, the Solicitor General, in the Government's brief in opposition to the petition, brought to the attention of the Supreme Court certain testimony which had been given before the Subcommittee on Legislative Oversight of the Interstate and Foreign Commerce Committee of the United States House of Representatives. This testimony, given after this Court's opinion in 1958, indicated that improper ex parte representations had been made on behalf of Signal Hill Telecasting Corporation by its president, and, to a lesser extent, by others, to members of the Commission with respect to the deletion of Channel 2 from Springfield and its reassignment to St. Louis. The Supreme Court granted the petition for a writ of certiorari, vacated the judgment of this Court affirming the Commission's decision, and remanded the case to this Court for such action as it deemed appropriate. Sangamon Valley Television Corp. v. United States, 358 U.S. 49 (1958).

On remand, the Commission and Signal Hill urged that because this was a rule making proceeding ex parte attempts to influence the Commissioners did not invalidate it. See Sangamon Valley Television Corp. v. United States, 106 U.S. App. D.C. 30, 33; 269 F.2d 221, 224 (1959). The Department of Justice contended, however, and this Court agreed (ibid.), that such questions, striking at fundamental concepts of fair play and the integrity of the administrative process, could not be left to turn on whether the label "quasi-legislative" or "quasi-judicial" is applied. See Brief of the United States on Remand from the Supreme Court, p. 10. This Court held that "the private approaches to the members of the Commission vitiated its action and the proceeding must be reopened" (106 U.S. App. D.C. at 33, 269 F.2d at 224).[7]

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[7] This Court also held that the proceeding must be reopened for the additional reason that acceptance after the record was closed of ex parte matters by the Commission violated its own "cut-off" rules and "[a]gency action that substantially and prejudicially violates its own rules cannot stand" (ibid.).

The Commission was ordered as a preliminary measure to conduct a special evidential hearing[8] to determine the nature and source of all ex parte pleas and other approaches that were made to the Commissioners while the former proceeding was pending and to report its progress in such a determination to this Court, along with any recommendations it should be able to make as to the further conduct of the proceeding. The Commission was allowed in its discretion to maintain existing services.

An evidentiary hearing on the ex parte issues was held before a specially appointed hearing examiner who released his Initial Decision on March 11, 1960. See 19 Pike & Fischer RR 1056j (1960). On February 15, 1961, the Commission released its Report and Recommendation to the Court in which it found that there had been various ex parte claims and pleas which had been made, particularly by Harry Tenenbaum, president and principal stockholder of Signal Hill. See 19 Pike & Fischer RR 1055 (1961).[9] It held, however, that in view of the then prevalent practice these representations were not particularly serious and were not "'clearly improper' when performed" (id. at 1056e). Accordingly, it concluded that these approaches, as well as gifts to various members of the Commission by Tenenbaum, did not disqualify

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[8] The Department of Justice contended that the ex parte matters as revealed by the testimony before the Legislative Oversight Committee in themselves required that the "proceeding [be] started afresh" (Brief, supra, p. 5), but also recommended that "as a preliminary 'appropriate action'" to beginning the proceeding anew an evidentiary hearing should be held since there was no basis for concluding that the record revealed the substance of all ex parte representations actually made (id. at pp. 10, 11).

[9] One of the principal purposes of Tenenbaum's twelve trips to Washington to visit various Commissioners, aside from creating a generally favorable climate to the removal of Channel 2 to St. Louis by urging that Signal Hill's UHF station had suffered severe financial losses over the years, was to leave a memorandum arguing in favor of the legality of a temporary grant to Signal Hill to operate on Channel 2 in St. Louis upon its allocation there. "This memorandum was prepared in response to the doubts of the Commission's General Counsel as to the foregoing legality, such doubts having been expressed to Signal Hill's attorneys, and by staff memorandum to the Commission" (19 Pike & Fischer RR, supra, at 1056c).

any Commissioner from participating in any further proceeding and neither absolutely disqualified Signal Hill nor warranted a comparative demerit against it as a broadcast licensee.

The Commission proposed to hold further proceedings in the allocations case, but these were to be severely restricted in scope. Parties to the original proceeding would be afforded an opportunity to respond on the record to any matters revealed by the special evidentiary hearing as having been presented off the record to any member of the Commission. Thus other parties in interest and other matters relevant to the issues were to be excluded, and the Commission stated that it would give no consideration to any matters ensuing since its original order of March 1, 1957 in the case. In determining to make this recommendation to this Court, the Commission stated that this Court had remanded the matter for a special evidentiary hearing because (1) basic fairness required such proceedings to be carried on in the open and (2) the Commission's reception of ex parte presentations after the cut-off date specified by the Commission substantially and prejudicially violated the Commission's own rules. The Commission concluded (id. at 1056e):

> "The foregoing factors, taken together with the Court's earlier opinion affirming the Commission's action on the merits, prompt the conclusion that it was the Court's opinion that the Commission's decision, although substantially correct, lacked a certain element of fairness desirable in rule making proceedings of particular and immediate effect."[10]

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[10] Two Commissioners dissented to this recommendation, one stating (id. at 1056g) that since the Court "has vacated this Commission's Report and Order of March 1, 1957, it is my view that this case must be reopened and that rule making on the record should be instituted de novo." The other dissenting Commissioner stated (ibid.) that "the Court of Appeals said that Mr. Tenenbaum's 'private approaches to the members of the Commission vitiated its action.' A majority of the Commission would now 'unvitiate' its action, so to speak, by permitting other parties to respond to such approaches . . . [but] the Commission has no alternative but to order a new rule making proceeding to determine whether Channel 2 should be moved out of Springfield and into St. Louis, leaving if it chooses, the present operation to continue in St. Louis until the matter is disposed of."

In a proceeding in this Court to review the Report and Recommendation of the Commission, the Department of Justice filed a separate brief opposing the proposal of the Commission. It noted that "[t]he ultimate question here . . . is the rule making determination as to where, for the future, Channel 2 should be allocated to provide a most equitable allocation of frequencies, not merely whether the 1957 determination should be revalidated to give a de jure status to what has been the de facto situation" (Brief for the United States on Review of Report and Recommendation of the Federal Communications Commission, Case No. 13,992, p. 6). It urged that "this prospective determination" could not properly be made on a "stale record" (ibid.).[11]

This Court agreed with the United States that "a fresh start is necessary" (Sangamon Valley Television Corp. v. United States, ___ U.S. App. D.C. ___; 294 F.2d 742, 742 (1961)), stating that "it would not be appropriate for the Commission to determine in 1961 on the basis of a somewhat supplemented 1957 record where and to whom VHF Channel 2 ought to be assigned" (ibid.). Accordingly, this Court remanded the case to the Commission with instructions to begin "an entirely new proceeding" (ibid.).[12] The Commission was permitted in its discretion to maintain existing services, and did so.

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[11] The United States said that this did not necessarily mean that Channel 2 should be placed back in Springfield pending the outcome of the new proceeding, but that the Commission, if it moved expeditiously to resolve the question anew, should be permitted to maintain existing services in order to prevent the possibility of "another temporary dislocation" should it ultimately appear that Channel 2 should be assigned to St. Louis (id. at pp. 8-9).

[12] The Court held that the Commission need not reconsider its conclusion that no Commissioner was disqualified to participate in the new proceeding and that no party was absolutely disqualified because of any ex parte representations, although it did "not doubt that conduct of the type Tenenbaum [of Signal Hill] engaged in, occurring since the Commission's earlier decision on this point in this case, would be grounds for disqualification" (ibid.).

4. The "New" Proceeding

On September 11, 1961, the Commission issued a new notice of proposed rule making with a new docket number, looking toward the de-intermixture of Springfield (R. 1-2). Noting that this Court had given it "instructions to conduct de novo rule making proceedings" (R. 1), the Commission stated that the "present proceeding is inaugurated pursuant to the Court's decision, and in conformity with the Commission's continuing consideration of means whereby competitive conditions in the television broadcast industry may be improved, and the number of TV services available to the public may be increased" (ibid.).

220 Television, Inc., which was authorized in 1959 to operate on Channel 11 in St. Louis, participated for the first time in the proceeding which began in 1961. 220 Television, Inc. took no position with respect to the wisdom or desirability of deintermixing Springfield, but participated in the proceeding solely for the purpose of urging that if the Commission should decide to delete VHF Channel 2 from Springfield, Section 307(b) of the Communications Act required that Channel's assignment not to St. Louis as the fifth available VHF channel and as the fourth commercial station, but to the area of Salem-Rolla, Missouri, a region now without any television service whatever.[13]

To this end, 220 Television, Inc., in its Comments (R. 321-34) and Reply Comments (R. 420-40) advanced a specific, concrete proposal for the use of Channel 2 for a first station at Salem-Rolla, thereby providing more than 60,000 persons in an area of more than 6,700 square miles with their first Grade B or better television service (R. 422) and some 90,000 persons in an area of approximately 4,000 square miles with their second Grade B or better service (ibid.). It

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[13] Under the Commission's minimum mileage separation requirements (see n. 3, supra, p. 4) with respect to co-channel stations, Channel 2 could be utilized at Salem-Rolla, Missouri and either Springfield, Illinois or Terre Haute, Indiana. It could not be utilized at both Salem-Rolla and St. Louis, at both St. Louis and Springfield, or at both Springfield and Terre Haute.

urged, therefore, that Section 307(b) of the Act and the Commission's own allocations priorities as set out in the Sixth Report and Order required the use of Channel 2 at Salem-Rolla as a first television service rather than at St. Louis as a fifth such outlet. The 220 Television, Inc. proposal was supported by the separate comments of approximately 300 individuals and business, civic and religious leaders in the Salem-Rolla area (R. 466-67; 477; 478-601; 602; 603; 604; 605-06; 607). No similar public response was generated by the proposal to assign Channel 2 to St. Louis, despite the fact that the station had been in "temporary" operation there since 1957.

Moreover, 220 Television, Inc., unlike any of the parties in the earlier proceeding, made a sworn commitment on the record (R. 428) that if Channel 2 were assigned to Salem-Rolla it would apply for a permit to construct and operate the station it was proposing for that area. Finally, 220 Television, Inc. pointed out that, in any event, assignment of Channel 2 to St. Louis would not further the Commission's stated objective of improving the opportunities for competition among a greater number of stations (R. 323-25; 420-22). This was so, it urged, because 220 Television's own experience in the St. Louis market as the fourth and last commercial station on the air in that city demonstrated that four competing commercial stations, only three of which could obtain network affiliations, could not survive indefinitely. Notwithstanding excellent facilities and personnel, and the best line-up of independent programming available, 220 Television, Inc., since beginning operations in April, 1959, had by September 30, 1961, suffered an aggregate operating deficit of more than $1,000,000 (R. 324).

In the Report and Order under review here (R. 628-50), the Commission rejected these contentions and the alternate proposal of 220 Television, Inc. Stating that it appreciated "the need of the residents of the Rolla-Salem area for a local outlet" (R. 646), the Commission recognized that use of Channel 2 as proposed by 220 Television could

"provide that area with a first VHF service" (R. 641) and that such a facility would "serve a sizeable area and population" (R. 646). Without even mentioning the specific commitment of 220 Television to construct and operate such a station, the Commission restated its earlier view that this "relatively small community" cannot support a local television station and that assignment of Channel 2 to the area "would be a waste of the scarce VHF spectrum space" (R. 646). The Commission stated that even if Salem-Rolla could support a local station, "such service could and should be provided in UHF" (R. 646), although it apparently recognized that it would require at least three UHF stations operating with at least 500,000 watts of power each to accomplish essentially the same coverage proposed by 220 Television, Inc. on Channel 2 (R. 645).

Without discussing the contention of 220 Television, Inc. that the Commission's own allocations priorities required use of Channel 2 as a first service in Salem-Rolla, the Commission held that such an assignment would not promote its objective of establishing opportunities for more effective competition among a greater number of stations since there appeared no chance that more than one VHF station could be developed there (R. 646, 647). It rejected the contention of 220 Television, Inc. that neither would that objective be served by assigning the channel to St. Louis since it was unlikely four commercial stations could survive there, on the grounds that (1) there was "no basis in the record for a judgment that even four commercial outlets are sufficient to satisfy the diversified television program needs of the people in a market the size of St. Louis" (R. 643) and (2) the operating losses of 220 Television, Inc. were without significance since a better measure of a station's ability to survive is its share of total broadcast revenues (R 644), and, on the basis of confidential financial information not of record in this proceeding, it stated that 220 Television, Inc.'s "share [of revenues] was not small . . ." (R. 644).

Finally, the Commission held that in any event Channel 2 should not be assigned to the area of Salem-Rolla, Missouri, because of the serious "dislocating" effect such an assignment would have on the public of St. Louis and contiguous areas who during the five year "temporary" operation of a station on Channel 2 in St. Louis had "benefit[ed] from having these five local television services" (R. 644) and had come to "depend upon it for a choice of television service" (ibid.; see also R. 640; 641; 646). The Commission concluded (R. 644): "The competing service provided by Station KTVI for the last five years in the area would also, it is apparent, create a great void if deleted."

Accordingly, the Commission on July 18, 1962, again issued an order deleting Channel 2 from Springfield, Illinois, and reassigning it to St. Louis, Missouri and Terre Haute, Indiana. Simultaneously it granted Signal Hill's pending application for a license to operate on Channel 2 in St. Louis (R. 648). The petition for review in this case followed on September 12, 1962. See Jurisdictional Statement, supra, pp. 1-2.

STATUTES AND REGULATIONS INVOLVED

Relevant portions of the Communications Act of 1934 and the Rules and Regulations of the Federal Communications Commission are set forth in the Appendix to this Brief.

STATEMENT OF POINTS

1. In refusing to make VHF television Channel 2 available for a first television reception and transmission service in the area of Salem-Rolla, Missouri, and in assigning it instead to St. Louis, Missouri, as that city's fourth commercial and fifth VHF allocation, the Commission violated the command of Section 307(b) of the Communications Act, that broadcast licenses be allocated so as to provide a fair, efficient and

equitable distribution of broadcast services among the several states and communities, and, in addition, violated, without discussion or explanation, its own basic and repeatedly affirmed doctrine applying that mandate to television allocations.

2. The Commission arbitrarily disregarded a specific and bona fide representation by 220 Television, Inc. that it would seek authority to construct and operate a television station on Channel 2 in the Salem-Rolla area of Missouri if the channel were assigned there, despite the fact that the Commission has in other allocation proceedings consistently regarded such a commitment as of primary importance in making an allocation, and despite the fact that in its 1957 report and order which preceded this case the Commission relied upon the absence of such a commitment in refusing to assign the channel to Salem, Missouri.

3. The Commission's conclusion that the public in the Salem-Rolla area should in their admitted need for television service rely on the potential utilization of the three UHF channels already assigned in the area is arbitrary and capricious, particularly in the failure of anyone to apply for the use of two of those channels in the ten years they have been available for application, and is contradicted by the Commission's own findings (1) that the area cannot support even one VHF station; (2) that in order to obtain UHF coverage comparable to that proposed by 220 Television, Inc. for Channel 2, stations operating on the three UHF channels would be compelled to utilize very substantial and unrealistic operating facilities; and (3) that much of the Salem-Rolla area already receives VHF service, a factor the Commission has consistently held to be controlling in determining that VHF rather than UHF assignments should be made.

4. In relying heavily for support for the Channel 2 assignment to St. Louis upon the fact that since 1957 station KTVI has been providing service on that channel in St. Louis, the Commission ignored the fact that there has never been a valid assignment of Channel 2 to St. Louis

and that KTVI was authorized to operate there only pendente lite, and acted in contradiction to the mandate of this Court and its own statement that the allocation question would be considered de novo in this proceeding.

5. In rejecting the showing of 220 Television, Inc. that no purpose would be served by assigning Channel 2 to St. Louis because the heavy losses experienced by the 220 Television, Inc. station demonstrated that for the long term no more than three commercial stations could survive in St. Louis, the Commission erred by (a) holding, contrary to its own precedents, that a station's "share" of the television revenues in the market was a better indication of its economic viability than the extent of its losses, and (b) finding that the station's revenue share was "not small" based upon financial data which were not only not a matter of record in the proceeding but were maintained in the confidential files of the Commission, so that the Commission's analysis of them was not subject to informed challenge.

SUMMARY OF ARGUMENT

1. Section 307(b) of the Communications Act requires that the Commission make a "fair, efficient, and equitable" distribution of television channels. With the approval of the courts, the Commission has consistently held that this requirement calls for consideration of the following objectives in descending order of importance: (a) the providing of a first television reception service, (b) the providing of a first local transmission service, (c) the providing of a second reception service, (d) the providing of a second transmission service, and (e), least important, the providing of additional competitive reception and transmission services. These five priorities have never been renounced by the Commission. Indeed they were followed by it in evaluating the Terre Haute and Springfield proposals in this proceeding.

But when it came to comparing the St. Louis proposal with that of 220 Television, Inc. that Channel 2 be assigned to the area of Salem-Rolla, Missouri, the Commission decided in favor of St. Louis, even though a station on Channel 2 there would provide only a fourth commercial and a fifth local television service and would provide neither a first nor a second reception service, while a station on Channel 2 at Salem-Rolla would provide a first local transmission service for the area, a first reception service to at least 60,000 persons and a second reception service to approximately 90,000 persons. Thus an assignment to Salem-Rolla would promote all of the first three of the Commission's priorities while assignment of Channel 2 to St. Louis would promote only the fifth and residual priority. The Commission failed to give any supportable reason for this departure from the provisions of Section 307(b) as they have been consistently interpreted, and the Commission's determination was therefore arbitrary and capricious.

2. In stating that VHF Channel 2 could not be put to effective use in the Salem-Rolla area but that instead the residents of that area should in their admitted need for television service rely upon the potential utilization of three UHF channels already assigned there, the Commission was arbitrary, capricious and self-contradictory. It overlooked the fact that a station on Channel 2 at Salem-Rolla would provide service to more than 200,000 persons. It expressed doubt that a VHF station could be made use of there and referred to its 1957 proceeding where a similar statement had been made, based in that case upon the failure of any party to indicate a willingness to build a station on Channel 2 at Salem-Rolla. But the Commission here, contrary to its consistent practice of taking the presence or absence of such commitments into account, wholly disregarded the fact that 220 Television, Inc. had made a firm commitment under oath to build and operate such a station at Salem-Rolla.

The Commission's statement that the area should rely upon the development of three UHF stations contradicted its expressed doubt that

even a single VHF station could be put to effective use in the area. It also disregarded the fact, which was relied upon in other aspects of the Commission's decision, that UHF station development is much more difficult and doubtful than is VHF station development, particularly in the presence of competing signals from VHF stations. Here the Commission pointed to the existence of such signals from outside in attempting to minimize the need of the Salem-Rolla area for a Channel 2 station, but disregarded that fact in assuming without evidence that two maximum-facility UHF stations would be placed in operation on channels which have forever been vacant and that a third UHF station would operate with maximum facilities even though it is now only a low power satellite.

3. In reaching its determination to assign Channel 2 to St. Louis the Commission relied heavily upon the fact that since 1957 station KTVI has been in operation on Channel 2 and the public in the St. Louis area have thus become accustomed to receiving its service. In placing this reliance the Commission acted as though Channel 2 had been validly assigned to St. Louis and station KTVI had been properly licensed for its use, so that the question was whether this channel should be removed from St. Louis and the license withdrawn from station KTVI. But Channel 2 has never validly been assigned to St. Louis and KTVI has been in operation only on a "temporary" basis pending the outcome of this proceeding. The original Commission decision in 1957 to assign Channel 2 to St. Louis and issue a license to KTVI has been nullified by reason of ex parte conduct and this Court has rejected the Commission's efforts to assign some residual vitality to that decision. Instead it has required, as the Commission itself has recognized, that a completely new proceeding be held. Under these circumstances it was wrong for the Commission to assign any weight to the fact that it had once improperly sought to assign Channel 2 to St. Louis and to the fact that station KTVI has been permitted to remain in operation pendente lite.

4. 220 Television, Inc. urged that one of the reasons Channel 2 should not be assigned to St. Louis was that no long term benefits to the public would accrue because the market could support no more than three commercial television stations, as shown by the experience of 220 Television, Inc.'s station, which had lost more than one million dollars despite competent and agressive management and despite facilities at least comparable with those of the other St. Louis stations. In rejecting this argument the Commission stated that operating losses were not indicative of the potentiality of the market, but rather that the station's share of the total revenues of the market was far more meaningful. This was contrary to consistent holdings of the Commission relying upon losses as a measure of the ability of a market to support stations, including its decision in 1957 to permit station KTVI to switch from Channel 36 to Channel 2, based upon representations made as to that station's operating losses. And when it said that 220 Television, Inc.'s share of total St. Louis television operating revenues was "not small" the Commission did not rely upon any matter of record in this proceeding or even upon a matter of which official notice could be taken, but instead relied improperly upon its evaluation of financial data which were submitted to it and maintained in its confidential files, so that it would not be possible for either 220 Television, Inc. or this Court to assess the Commission's evaluation.

ARGUMENT

I.

The Commission Erred as a Matter of Law by Failing to Conclude that Sections 1 and 307(b) of the Communications Act Compelled the Assignment of Channel 2 to the Area of Salem-Rolla, Missouri Rather than to St. Louis.

It is well settled that the Commission has considerable latitude in determining how the television spectrum space ought to be utilized (see, e.g., Springfield Television Broadcasting Corp. v. Federal Communications Commission, 104 U.S. App. D.C. 13, 15; 259 F.2d 170, 172 (1958)),

even if such a determination "involve[s] not only allocation of the TV channels among communities but also resolution of conflicting private claims to a valuable privilege" (Sangamon Valley Television Corp. v. United States, 106 U.S. App. D.C. 30, 33; 269 F.2d 221, 224 (1959)). It is equally clear, however, that the Commission's discretion in this respect is not limitless but is specifically bounded by the requirements of Sections 1 and 307(b) of the Communications Act.

Thus, as this Court recently held in Television Corporation of Michigan, Inc. v. Federal Communications Commission, ___ U.S. App. D.C. ___; 294 F.2d 730, 732 (1961):

> "Section 1 of the Communications Act . . . directs the Commission to make radio facilities (and presumably television also) available as far as possible to 'all the people of the United States.' Section 307(b) of the Act . . . repeats this mandate, stressing that the Commission shall provide a 'fair, efficient, and equitable distribution' of service 'among the several States and communities.' The general intention of Congress is clear. The Commission sought to implement it in its Sixth Report and Order . . . where it established the following priorities:
>
> '"Priority No. 1: To provide at least one television service to all parts of the United States.
>
> '"Priority No. 2: To provide each community with at least one television broadcast station.
>
> '"Priority No. 3: To provide a choice of at least two television services.
>
> '"Priority No. 4: To provide each community with at least two television broadcast stations.
>
> '"Priority No. 5: Any channels which remain unassigned under the foregoing priorities will be assigned to the various communities depending on the size of the population of each community, the geographical location of such community, and the number of television services available to such community from television stations located in other communities."'

220 Television, Inc. made clear in its comments and reply comments before the Commission that its proposal to assign Channel 2 to the Salem-Rolla area of Missouri would fulfill the first three and most important of the five allocations priorities whereas its assignment to St. Louis would serve only the residual and obviously least important fifth priority. Thus a station in the Salem-Rolla area as proposed by 220 Television, Inc.,[14] would provide a first local service there, thus meeting Priority No. 2, as well as interference-free Grade B service to more than 240,000 persons in an area of more than 12,000 square miles (R. 422). Of those persons, more than 60,000 in an area of more than 6,700 square miles would receive a first Grade B or better service (R. 422).[15] Thus Priority No. 1 would be served. And the 220 Television, Inc. proposal would bring a second Grade B or better service to approximately 90,000 persons in an area of some 4,000 square miles (R. 422; 437), thus serving Priority No. 3.[16]

In contrast, as 220 Television, Inc. showed, Channel 2 at St. Louis would provide neither a first nor a second television reception service to any population or area, and it would be the fourth commercial and the fifth television station in St. Louis (R. 424-25). Thus assignment of Channel 2 to St. Louis would meet only the residual Priority, No. 5.

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[14] 220 Television, Inc. proposed to construct and operate a station with a power of 100 kw and an antenna height of 1,000 feet (R. 334) at a site near Salem, Missouri which would meet all the minimum mileage separation requirements of the Commission (R. 329) and provide the required principal city grade signal to both Salem and Rolla, Missouri (R. 432). The technical feasibility of the proposal was not questioned.

[15] Based on another accepted method of computing coverage, the "white" area the 220 Television, Inc. proposal would serve would contain more than 4,900 square miles, encompassing a population in excess of 80,000 persons (R. 422, 437).

[16] The assignment of Channel 2 to Salem-Rolla would avoid VHF Grade B overlap with any UHF Grade B contour and would therefore be completely consistent with the Commission's objective of preserving the present status of UHF pending the ultimate solution to the VHF-UHF problem (R. 423; 439).

This showing as to the contrast under the priorities between an assignment to St. Louis and one to Salem-Rolla was undisputed in the Commission's opinion.

Nor did the opinion in any way state that the Commission had abandoned the application of Section 307(b) which is embodied in the formulation of the five priorities, a formulation which has been consistently reiterated and affirmed by the Commission and the courts since its promulgation in 1952. On the contrary, in the discussion in this very opinion of the question whether an assignment should be made to Terre Haute or Springfield, the Commission made it clear that it still adheres to the doctrine which is embodied in the five priorities. Thus it stated that (R. 642):

> "It appears from the record that the use of Channel 2 at Terre Haute would not only provide a critically needed competitive local service [Priority No. 4] but would also provide a first Grade B signal [Priority No. 1] to a potential white area with a larger population than would the use of Channel 2 at Springfield. Engineering data submitted by the Springfield UHF operators indicate that an estimated area of 486 miles containing 38,933 people, now beyond the Grade B contour of any existing station, would be within the Grade B interference-free contour of a Channel 2 station at Terre Haute. This, according to their estimates, would bring a first interference-free Grade B signal to approximately 2-1/2 times the population of the potential 'white area' which a Springfield Channel 2 station would serve."

But when it came to the Salem-Rolla proposal, the Commission did not even discuss the contentions of 220 Television, Inc. that the five priorities required the use of Channel 2 at Salem-Rolla. It noted merely that it had "considered the arguments and cases cited by . . . 220 Television in support of [its] position that this course of action violates Section 307(b) of the Act. We do not find them persuasive" (R. 646).

Yet the Commission pointed to no allocations objective that could possibly warrant abandoning the five priorities of the Sixth Report and Order in its determination to assign Channel 2 to St. Louis rather than to Salem-Rolla. It stated in the Notice of Proposed Rule Making (R. 1) and repeated in the Report and Order (see R. 644; 646; 647), that one of its primary concerns in undertaking the deintermixture of Springfield was the equalization of competitive opportunities among a greater number of stations. But whatever the validity of this concept as applied to the deintermixture aspect of the present proceeding (see Coastal Bend Television Co. v. Federal Communications Commission, 98 U.S. App. D.C. 251; 234 F.2d 686 (1956); WIRL Television Corp. v. United States, 102 U.S. App. D.C. 341; 253 F.2d 863 (1958), judgment vacated on other grounds, 358 U.S. 31), it clearly should not control the reassignment of Channel 2 upon a determination to deintermix Springfield by deleting the channel from that city.

The suggestion (see R. 645) that by withholding a VHF assignment as many as three UHF stations can come into being in the Salem-Rolla area is refuted by facts of which the Commission reflected full awareness in its opinion: (1) Two of the UHF channels in question are now vacant (ibid.), and in fact the Commission's records reflect that in the more than ten years since these channels were assigned there has never even been an application for them; (2) UHF station development is far more difficult than with the VHF (see R. 636), and the Commission here has expressed doubt that a VHF station is possible in Salem-Rolla (R. 645); and (3) the Commission reports a measure of multi-station VHF penetration of the Salem-Rolla area (R. 644-45), a factor which in the case of the much more populous Springfield and Peoria areas the Commission in this very proceeding has held must be averted by deintermixture in order to protect UHF station development.[17] It is

[17] As the Commission has said (Fresno Deintermixture Case, 19 Pike & Fischer RR 1581, 1585 (1960)): "If there is one circumstance which has been established beyond doubt in the manifold experiences of UHF operators everywhere that they compete with VHF, it is that, for a complex of familiar reasons

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evident from the Commission's own findings, therefore, that there is no reasonable expectation of UHF development in the Salem-Rolla area, and that the refusal to assign Channel 2 there can in no way promote television development in that area.

It is clear, therefore, that what the Commission really meant when it said that its decision would "distribute television channel assignments in the manner which is most likely to augment opportunity for full and effective use . . ." and "to provide the greatest amount of television service to the public in the communities involved" (R. 646) was that this would provide additional competition by making available a fifth service to the large metropolitan area of St. Louis. But such an objective cannot be of overriding concern even when service is to be provided to the largest of markets. Otherwise the Commission's primary objectives of providing at least one television service to all parts of the nation and of establishing a local television outlet in each community would never be achieved so long as it was technically possible to improve the competitive climate in a larger community which already had one or more stations. Assignments that encourage the development of a greater number of competitive outlets may meet a valid ingredient of the Section 307(b) standard, but, as the Commission itself recognized in the Sixth Report and Order when it made this factor the fifth and last priority, such assignments are the least vital and should not be made if they involve the sacrifice of other more important priorities.[18] Section

17 (continued from preceding page)
related to receiver conversion, advertiser support, program availabilities and other related factors, UHF operations, however serviceable to the public, are subjected to competitive adversities which impose seemingly inescapable and substantial burdens upon the chances for financially successful operation of a UHF service in competition with an available VHF service." See also Triangle Publications, Inc., 17 Pike & Fischer RR 624, 624f-624g (1960); WHAS, Inc., 21 Pike & Fischer RR 929, 940 (1961).

18 Since it already has four VHF assignments aside from Channel 2, St. Louis clearly is not one of the "special cases" involving substantial markets where only two competitive outlets are available which could conceivably warrant abandonment of the top priorities in favor of additional competition. Interim Policy on VHF Television Assignments, 21 Pike & Fischer RR 1695 (1961).

307(b), as the Commission itself has recognized, requires that providing a first service is paramount to providing multi-station competition.

Moreover, the Commission in other proceedings, involving both the reassignment of deleted VHF channels upon the deintermixture of various communities and the proposed allocation of additional available channels not included in the original table of assignments, has recognized the controlling importance of providing a first service to so-called "white" areas. Indeed, in the Second Report on Deintermixture, 13 Pike & Fischer RR 1571 (1956), in the very deintermixture proceeding that led to the institution of the present case, the Commission reaffirmed the necessity of attaining a "fuller achievement of the objectives of the Sixth Report and Order" (id. at p. 1572). The Commission noted (ibid.):

> "Briefly stated, those objectives were to encourage the development of a nationwide competitive television system in which:
>
> (a) All areas would have at least one service;
>
> (b) The largest possible number of communities would have at least one local television station; and
>
> (c) Multiple services would be available in as many communities and areas as possible to provide adequate program choice to the public and encourage the development of competition - among broadcasters, networks and other elements of the industry."

The Commission then proceeded to outline certain subsidiary criteria which would generally govern its interim program of selective deintermixture and assignment of additional VHF channels (id. at pp. 1581-82). But it did not suggest that it was abandoning the primary objectives stated in favor of the secondary criterion, although it noted that "[a]mong these three basic objectives, the greatest progress has been made in achieving the first. It is estimated that over 90% of the population can

receive service from at least one television station" (id. at 1572).[19]

Similarly, in a further Report and Order issued by the Commission on November 17, 1961 (some eight months prior to the release of the present Report and Order) in a proceeding involving, inter alia, a proposal to add a fifth competitive VHF commercial channel to the San Francisco area and a fourth to Sacramento, the Commission again made clear its primary allocations objectives. Channel Assignments in San Francisco and Sacramento, 22 Pike & Fischer RR 1519 (1961). "The record bears out . . . ," the Commission said (id. at 1526), "that both the San Francisco and Sacramento television markets are of a size and importance that can support additional local outlets [footnote omitted] and that the varied television needs of both areas are not fully satisfied by the multiple VHF services available." But the Commission concluded (id. at 1526-27):

> "We believe it in accord with this [interim] policy [concerning VHF television channel assignments] and the public interest to use the few available VHF frequencies to bring, so far as possible, needed television service to major VHF markets lacking three local services and to other smaller VHF areas needing local outlets and service when it would not infringe significantly upon existing UHF service. With the 12 VHF channels virtually saturated, augmenting VHF assignments at either San Francisco or Sacramento would eliminate one of the few possibilities remaining for a ready solution to the need for local television outlets and service in VHF areas in northern California which are more underserved than the Sacramento and San Francisco areas."[20]

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[19] Thus, the more than 60,000 persons in the Salem-Rolla area who would receive their first television service if Channel 2 were assigned there are among the remaining very few who have as yet not benefited from the mandate of Section 307(b) of the Act.

[20] The Commission also rejected a proposal to assign Channel 12 as the first local service to Santa Rosa, "a growing area of northern California" (id. at 1527), on the grounds that (1) the area already received some service from stations located in other communities; (2) the assignment would necessitate changes in frequency required for existing stations; and (3) no parties had indicated any interest in actually constructing and operating a station there if Channel 12 were assigned. None of these factors exists in the present case. See pp. 28-31, infra.

Accordingly, the Commission refused to forego the possibility of providing television service to underserved or unserved areas merely in order to introduce an additional competitive facility in those two markets even though it concluded that they could support additional facilities and that the programming needs of the public there were not fully satisfied. That decision comports fully with the five priorities of the Sixth Report and Order. See also Bakersfield Deintermixture Case, 21 Pike & Fischer RR 1549, 1571-72 (1961); Channel Assignments in Sterling, Colorado and Cheyenne, Wyoming, 24 Pike & Fischer RR 1567 (1962).

Nor is it any answer to say that St. Louis, as "the tenth largest city in the country and the ninth ranking standard metropolitan statistical area" (R. 642), is entitled to special consideration and should receive its fourth commercial VHF channel before the "relatively small community" (R. 645) of Salem-Rolla should receive its first even if it is true that "the record evidences a need in a market of this size for at least four commercial local outlets" (R. 644). As the Commission has recognized, at least until the present case, television assignments "cannot be made in a vacuum purely on the basis of size and importance of the competing markets" (Peoria Deintermixture Case, 15 Pike & Fischer RR 1550c, 1560 (1957)). See also Fresno Deintermixture Case, 15 Pike & Fischer 1586i, 1596 (1957). And, as 220 Television, Inc. pointed out (R. 323), there are other markets of comparable or even larger size which have no more stations than St. Louis had before the assignment of Channel 2.

Any contention that questions of the proper utilization of the spectrum space should turn on the premise that an assignment which would quantitatively serve a larger number of persons is prima facie the more desirable was specifically rejected by this Court in the case of Television Corporation of Michigan, Inc. v. Federal Communications Commission, supra. There the Commission authorized a television station to change the site of its transmitter since the change of location

would enable the station to serve within its proposed Grade B contour 103,000 more persons than from the old site. The Commission did not consider sufficiently adverse to bar the move the facts that it would (1) eliminate the only service available to about 900 persons, (2) reduce to one the number of services available to some 42,000 persons, and (3) deteriorate the only service available to another 85,000 persons.

This Court reversed the Commission's decision because (___ U.S. App. D.C., supra, at ___; 294 F.2d at 732, 733):

> "It is apparent that the Commission has started with the premise that more service to more people--even to a group already well served-- is prima facie desirable, and that it must then consider whether this advantage is offset by the negative factor of loss of service by others. Our Hall opinion expressed the opposite approach--that deprivation of service to any group was undesirable and to be justified only by offsetting factors. See 99 U.S. App. D.C. 86, at page 91, 237 F.2d 567, at page 572. The difference is not merely one of words. It is basic to the Commission's approach to its task.
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> * * *
>
> "Neither the statutory sections nor the 'priorities' express rigid and inflexible standards: the Commission has a broad measure of discretion in dealing with the many and complicated problems of allocation and distribution of service. Logansport Broadcasting Corp. v. United States, 1954, 93 U.S. App. D.C. 342, 346, 210 F.2d 27, 28. But in the present case the Commission's action would seem prima facie contrary to Priorities 1 and 3, because it would deprive about 900 people of any service, and deprive about 42,000 people of all but one service."[21]

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[21] As to the people in the Muskegon area who would lose service, the Commission had stated that there were two television channels allocated to Muskegon by the Commission's Rules. The Court pointed out that the Commission "does not add that these are UHF channels, nor does it discuss whether there is any likelihood of their coming into service" (___ U.S. App. D.C. at ___; 294 F.2d at 733). The Commission in the present case seeks to avoid that fault by concluding that there is no reason why the persons in the Salem-Rolla area should not look to the UHF channels available for their admitted service needs. The Commission's totally untenable proposal in this respect is discussed at pp. 31-35, below (and see pp. 22-23, supra).

While that case involved the deprivation of existing services, and the instant one presents a question of the Commission refusing in the first instance to provide any service, the rationale is of equal force here. The Commission has simply ignored the priorities it has established under Section 307(b) and, although "appreciat[ing] the need of the residents of the Rolla-Salem area for a local outlet" (R. 646), has sought to justify its failure to remedy that need by pointing to the benefits received by the much larger St. Louis market from "the five local television services" available there over the past five years due to the temporary operation of station KTVI on Channel 2 (R. 674). Obviously such reliance not only cannot be reconciled with the first three priorities but, as we show elsewhere (see pp. 36-39, below), specifically violates the mandate of this Court that an entirely new proceeding be conducted to determine where and to whom Channel 2 ought to be assigned.

II.

The Commission Erroneously Concluded that VHF Channel 2 Could not be put to Effective Use in or Near Salem-Rolla but That Instead the Residents of the Area Should in Their Admitted Need for Television Rely Upon the Potential Utilization of the Three UHF Channels Already Assigned in the Area.

1. The Commission arbitrarily disregarded a representation by 220 Television, Inc. that it would build and operate a station on Channel 2 in Salem-Rolla.

The Commission has regularly held that an important factor in determining whether particular assignments will be utilized is the presence or absence in the record of representations by prospective licensees that they will seek construction and operating authority for the channels if they are assigned as proposed.[22] Thus, in a recent

[22] See, e.g., Radio Wisconsin, Inc., 8 Pike & Fischer RR 467 (1952); Eastern Oklahoma Television Corp., 9 Pike & Fischer RR 942 (1953); Head of the Lakes

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proceeding involving proposed assignments in the northern California area, Channel Assignments in San Francisco and Sacramento, 22 Pike & Fischer RR 1519 (1961), the operators of existing stations in San Francisco and Stockton opposed the proposed assignment of Channel 12 to either of those two areas and proposed instead that the channel be allocated to the city of Santa Rosa, California, which had no local television service, but, unlike the Salem-Rolla area, was well-served by stations located in other communities (id. at 1527).[23]

The Commission rejected the proposal on the following grounds (id. at 1527):

> "The proponents of the proposal, licensees of existing stations at Stockton and San Francisco who oppose the assignment of Channel 12 to their respective areas, did not indicate that they themselves were interested in establishing a local station at Santa Rosa. Nor does the record reveal that others may be interested in doing so. In light of the signals received in the Santa Rosa area from the San Francisco stations, we believe it is questionable whether the channel could be effectively used there. These factors, as well as the changes in frequency required for existing stations, compel us to the conclusion that adoption of neither counterproposal is warranted at this time."[24]

Moreover, in the original Springfield deintermixture proceeding in 1957, the operator of a VHF station in Terre Haute, Indiana opposed the Commission's proposal to reassign Channel 2 to Terre Haute as that

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22 (continued from preceding page)
Broadcasting Co., 9 Pike & Fischer RR 1370 (1953); Channel Assignment in Elk City, Oklahoma, 14 Pike & Fischer RR 1534 (1956); Channel Assignment in Carbondale-Harrisburg, Ill., 16 Pike & Fischer RR 1617 (1958); Educational Channel Reservations, 18 Pike & Fischer RR 1865 (1959); Channel Assignment in Panama City, Florida, 18 Pike & Fischer RR 1761 (1959); Channel Assignments in Hamilton, Alabama, 21 Pike & Fischer RR 1577 (1961).

23 Assignment of Channel 12 to Santa Rosa would involve changing the frequencies of other existing stations to minimize objectionable interference (id. at 1521-22).

24 The Commission did not consider the relatively small size of the Santa Rosa area (id. at note 9, p. 1527) as disqualifying it for a VHF assignment.

city's second VHF commercial channel upon its deletion from Springfield, and urged instead that Channel 2 be made available for a local television outlet in each of the two cities of Salem, Missouri and Salem, Illinois.[25] The Commission rejected this proposal, stating (15 Pike & Fischer RR at 1535):

> "No parties have indicated in this proceeding that they would apply for channels in Salem, Missouri or Salem, Illinois; and there is no indication that communities of such small size can make effective use of these frequencies. We cannot find that the public interest would be served by assigning Channel 2 to these communities, even though they presently have no local outlets or service, especially in light of the need and demand for Channel 2 in other much larger cities."[26]

In the instant proceeding, however, 220 Television, Inc. not only convincingly demonstrated that Channel 2 could be put to effective use in the area of Salem-Rolla by bringing a new service to some 200,000 persons and a first television service to a "white" area including between 60,000 and 80,000 persons, but made the critical representation that if Channel 2 were assigned there it would seek authority to build and operate a station as proposed in its comments (R. 428). Notwithstanding the Commission's past and contemporaneous treatment of such representations as crucial to the issue of frequency utilization, it simply ignored 220 Television, Inc's specific and bona fide proposal.[27] The Commission merely stated (R. 645):

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[25] An assignment of Channel 2 at both Salem, Illinois and Salem, Missouri would preclude its use at both St. Louis and Terre Haute. See 15 Pike & Fischer RR 1527, at 1532 (1957).

[26] The Commission said that since it was rejecting use of Channel 2 in these two cities "coverage data with respect to this proposal is not discussed in detail" (id. at note 7, p. 1533). In fact, it did not discuss such data at all. As already indicated (see Statement, supra, p. 5), the proponent of the proposal to assign Channel 2 to Salem, Illinois and Salem, Missouri did not seek review of its rejection by the Commission and the issue was not raised by the single petitioner in Sangamon Valley Television Corp. v. United States, 103 U.S. App. D.C. 113; 255 F.2d 191 (1958).

[27] It also ignored the significance in this respect of the more than 300 letters and comments lodged by various business, civic, educational and religious leaders in the Salem-Rolla area supporting the proposal of 220 Television, Inc. to construct and operate a station there. Such support is an additional factor that appears to have been missing in the 1957 proceeding.

> "We considered a proposal to assign Channel 2 to the Salem area in the 1957 Springfield deintermixture proceeding. One of our reasons for rejecting it was that we did not feel that the channel could be put to effective use in or near this relatively small community. We are still of that view . . . ."

But any suggestion that the Commission's 1957 determination or this "Court's earlier opinion [in 1958] affirming the Commission's action on the merits" (Report and Recommendation to the Court, 19 Pike & Fischer RR 1055, 1056e (1961)) is a basis for reaching in this case the same conclusion with respect to Salem was specifically rejected by this Court when it ordered the Commission to conduct an entirely new proceeding to determine where and to whom Channel 2 ought to be assigned. Whatever the deficiencies of the 1957 record (and it should be repeated that this issue was in any event not before the Court in 1958), the fact remains that in the present case all the pertinent evidence of record demonstrably shows that by the Commission's own criteria[28] Channel 2 could and would be put to effective use if assigned to the area of Salem-Rolla, Missouri. The Commission's total disregard of this vital evidence, and its failure even to discuss it, requires that the Report and Order be set aside.

> 2. The conclusion of the Commission that the public in the Salem-Rolla area should rely on UHF is arbitrary and capricious and contradicted by the Commission's own findings.

While completely ignoring the sworn commitment of 220 Television, Inc. to seek authority to construct and operate a station on Channel 2 in Salem-Rolla and while holding that Channel 2 could not be put to effective use in or near "this relatively small community" (R. 645), the Commission

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[28] If the present case is intended as a "departure from prior norms" (Secretary of Agriculture v. United States, 347 U.S. 645, 653 (1954)), the Commission at the very least is required to explain it and spell out "the legal basis of its decision" (ibid.). Moreover, it would be difficult to imagine a doctrine which would be consistent with Section 307(b) of the Act and yet would depart from the five criteria to the radical extent necessary to justify the Commission's decision here.

concluded nevertheless that "[t]here appears to be no reason why Channel 46, assigned to Rolla, cannot be effectively used to provide local service in the Rolla-Salem area" (R. 645). It noted that a station operating on that channel with a power of 500,000 watts and an antenna 1,000 feet high, plus "similar stations operating at West Plains, where Channel 20 is assigned, and at Poplar Bluff, would provide a greater area and population with a Grade B signal and a greater area and population with a first Grade B signal than would the proposed Channel 2 operation of 220 Television" (ibid.).

To the contrary, there are a number of reasons flatly contradicting the Commission's proposal that "if and when this area can support a local television service, such service could and should be provided in UHF" (R. 645).

The most obvious reason is that, while the Commission has ignored it, the evidence of record affirmatively shows that the area at the present time can support a local VHF television station, but there is none whatever that it can support the three UHF television stations which, the Commission recognized, would be required in order to provide essentially the same coverage as that proposed by 220 Television, Inc. for Channel 2. Unlike the specific and concrete commitment by 220 Television, Inc. to build a station on Channel 2, no authority for stations, on either of the two UHF channels at Rolla and West Plains, with their restricted coverage possibilities in an admittedly sparsely populated area, has ever been sought, and there is no indication that it ever will be.[29]

Moreover, even if applications were filed for these two available UHF frequencies, and stations constructed, there is absolutely no reason

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[29] In noting in the 1957 proceeding that the assignment of Channel 2 to Salem, Illinois would preclude its use at Terre Haute and thus foreclose the possibility of an additional outlet in that city, the Commission stressed (15 Pike & Fischer RR 1525, at 1535 (1957)): "No application for the UHF channels assigned to [Terre Haute] are indicated."

to assume an operation on either channel of a greater magnitude than the minimal, low-powered, limited-coverage station now on the air at Poplar Bluff, Missouri, the third station referred to by the Commission in its suggestion that UHF might serve the needs of the Salem-Rolla area (see R. 334). The Commission's assumption that UHF stations utilizing 500,000 watts of power and antenna heights of 1,000 feet are practicable or economically feasible in this relatively remote area is specifically contradicted by the history of the only UHF operator in the area[30] and by the Commission's own experience with the coverage and technical deficiencies of UHF. Thus, in a notice of proposed rule making issued in 1961 concerning the long-range aspects of the UHF problem, Fostering Expanded Use of UHF Television Channels, 21 Pike & Fischer RR 1711, 1715 (1961), the Commission forecast:

> ". . . a more thorough-going reallocation of channel assignments looking toward providing substantially all-UHF assignments in certain areas of the country where population is dense and communities capable of supporting television stations are located close together. This will permit the employment of the VHF channels for an expanded, multi-channel all-VHF service in other areas, particularly those where terrain or sparseness of population make VHF service more appropriate."

Any contention that 220 Television, Inc. would find insufficient support in the basic audience of some 200,000 persons proposed whereas each of three UHF stations (assuming, contrary to the fact, that there was some indication of interest in establishing additional UHF stations), with its attendant greater costs of operation, could survive on something more than one-third of that audience, is obviously without merit.

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30 The existence or pendency of UHF translator stations (maximum allowable power - 100 watts) in the West Plains area (R. 645) is irrelevant. For the Commission's rules and policies make clear that allocation of regular television broadcast stations is paramount to providing translator or CATV service. Thus Section 4.702(d) of the Commission's Rules and Regulations provides that changes in the television table of assignments, concerning regular stations, may be made without regard to the effect on existing or proposed translator stations. See also Sections 4.703(a)(b), 4.732 of the Rules and Regulations and Notice of Proposed Rule Making released on December 14, 1962, in Docket No. 14895 (FCC-62-1285).

Finally, the Commission has long recognized the intolerable competitive burden a UHF station bears when it is confronted with VHF competition, not only from other stations licensed in the same intermixed market but from those located in other communities whose signals penetrate the UHF coverage area. See, e.g., Bakersfield Intermixture Case, 21 Pike & Fischer RR 1549 (1961); Channel Assignments in Carbondale-Harrisburg, Ill., 16 Pike & Fischer RR 1617 (1958). While the Channel 2 station proposed by 220 Television, Inc. would bring a first service to more than 60,000 persons, the Commission recognized that the Salem-Rolla region is generally a VHF area. It stated (R. 644-45):

> "The 1960 ARB Television Coverage Study indicates that about half of the homes in Dent County (Salem) are equipped for television, and that over 50 percent of the television homes can receive three of the St. Louis stations (2, 4, 5), 96 percent can receive Station KRCG at Jefferson City and 85 percent can receive Station KOMU at Columbia, Missouri. The survey also shows that in Phelps County (Rolla), .. 84 percent of the homes are estimated to be television homes and that about the same percentage of homes as in Dent County can receive the St. Louis, Jefferson City and Columbia stations. The survey data indicate that most of these homes view these stations at least once a week. It would therefore appear that there is a considerable amount of television service available in this area."[31]

This finding of "a considerable amount of [VHF] service available in this area" specifically contradicts the Commission's conclusion that

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[31] While such survey data would tend to indicate more television coverage from these VHF stations than could be predicted on the basis of computed engineering contours, even on the basis of the latter there is a substantial amount of VHF service available in the area although there are also substantial areas without any service (see R. 376-82).

there is no reason why these UHF channels cannot be developed to meet the admitted service needs of the public in the area.[32]

It is true that the Commission also found that "letters received from residents of the area indicate that reception of VHF signals from other cities is not too satisfactory . . ." (R. 646). But the former finding apparently was made to support the Commission's conclusion that Channel 2 could not be effectively utilized in the Salem-Rolla area and the latter to support the conclusion that there was no barrier to the development of UHF.

We submit, however, that the Commission cannot have it both ways. If indeed there is even marginal VHF service to the Salem-Rolla area, this fact must detract from the already-dubious possibility of UHF operation in that area. And if service from those VHF stations is unsatisfactory throughout part or all of the area, the need under Section 307(b) of the Act and the five priorities for the assignment of a station there is increased. At the very best the Commission's statement of reasons is unclear and self-contradictory. The Commission has "wide discretion in formulating appropriate solutions," Secretary of Agriculture v. United States, 347 U.S. 645, 652 (1954). But that exercise must fall within statutory bounds and is subject to review by this Court, which cannot perform its reviewing function when it is "left to spell out, to argue, to choose between conflicting inferences," United States v. Chicago, M., St. P. & P.R. Co., 294 U.S. 499, 510-11 (1935). See also Telanserphone, Inc. v. Federal Communications Commission, 97 U.S. App. D.C. 398, 401; 231 F.2d 730, 735 (1956).

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[32] The existence of these "VHF stations in other cities providing service in the area" (Channel Assignments in Carbondale-Harrisburg, Ill., supra, 16 Pike & Fischer RR at 1624) provides the probable reason for the failure of the UHF station at Poplar Bluff to develop its marginal facilities. See pp. 22-23, supra.

III.

The Commission Acted on the Erroneous Theory that the "Temporary" Operation on Channel 2 at St. Louis Gave Rise to Strong Presumptions Favoring the Assignment of the Channel There.

In reaching its decision to assign Channel 2 to St. Louis rather than to Salem-Rolla and to issue a license to station KTVI for operation in St. Louis, the Commission acted as though this proceeding were one to determine whether Channel 2 should be removed from an existing allocation at St. Louis and whether an existing licensee and the public in the St. Louis area should be deprived of the benefits of that license. Thus, the Commission assigned a substantial presumption in favor of "retention" of the assignment in St. Louis, as would perhaps have been appropriate if Channel 2 had been assigned regularly to St. Louis and if station KTVI had been granted a regular and proper license for use of that channel. See Television Corporation of Michigan Inc. v. Federal Communications Commission, ___ U.S. App. D.C. ___; 294 F.2d 730 (1961).

That the Commission acted on this basis is clear from its opinion, in which it stated that:

> ". . . Channel 2 is now providing a needed service to the public in the St. Louis area; and it will shortly provide Terre Haute with a needed second local VHF service . . . In these circumstances, there would have to be strong countering public interest considerations to lead to a conclusion to use Channel 2 at Springfield at this time." (R. 640)
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> ". . . The data submitted on the programming offered by the four St. Louis commercial stations, and also the educational station, demonstrate, in our opinion, that the public is benefiting from having these five local television services. The competitive service provided by station KTVI for the last five years in the area would also, it is apparent, create a great void if deleted. Thousands of people in both Illinois

> and Missouri depend upon it for a choice of television service." (R. 644)
>
> * * *
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> ". . . An . . . important consideration [against assigning Channel 2 to Salem-Rolla] is that Channel 2 could not be used in the Salem-Rolla area without depriving a large area and population in Illinois and Missouri of a needed competitive service which they have been receiving for the past five years from the Channel 2 station at St. Louis." (R. 646)

But Channel 2 has never validly been assigned to St. Louis and station KTVI has never been licensed on a regular basis for operation there. On the contrary, when the Commission issued its Report and Order which is the subject of this proceeding Channel 2 was still assigned to Springfield, Illinois, and station KTVI was operating on Channel 2 at St. Louis under a "temporary" authorization which had been permitted by this Court solely to prevent dislocation pending the outcome of Court and Commission proceedings.

It is true that the Commission purported to assign Channel 2 to St. Louis in its 1957 proceeding, when at the same time it took what its General Counsel's office considered to be "extraordinary procedures" to authorize the operation of station KTVI on Channel 2 on a "temporary" basis. But its order assigning Channel 2 to St. Louis has been set aside by this Court, which rejected a Commission suggestion that its 1957 decision still retained some residual vitality.

Thus the Commission in 1961 suggested in its "Report and Recommendation to the Court" (Sangamon Valley Television Corp., 19 Pike & Fischer RR 1055, 1056e (1961)) that an entirely new proceeding was not necessary and that "the Court's earlier opinion affirming the Commission's action on the merits . . . [prompts] the conclusion that it was the Court's opinion that the Commission's decision, although substantially correct, lacked a certain element of fairness desirable in rule making proceedings of particular and immediate effect," and therefore only a partial reopening of the prior record should be accomplished.

But in the proceeding in this Court on review of the Commission's Report and Recommendation, the Department of Justice, representing the United States, the statutory respondent, disagreed with this position of the Commission. The United States pointed out (Brief for the United States, Case No. 13,992, p. 6) that:

> "The ultimate question here . . . is the rule making determination as to where, for the future, Channel 2 shall be allocated to provide a most equitable allocation of frequencies, not merely whether the 1957 determination should be revalidated to give a de jure status to what has been the de facto situation."

This Court adopted the position of the United States and rejected that of the Commission, ordering that "an entirely new proceeding" should be held. Sangamon Valley Television Corp. v. United States, ___ U.S. App. D.C. ___; 294 F.2d 742, 743 (1961). And the Commission recognized in its Notice of Proposed Rule Making in the proceeding now on review (R. 1-2) that this Court had given "instructions to conduct de novo rule-making proceedings."

But in placing heavy reliance upon the existence pendente lite of the operation of KTVI the Commission has made it clear that it has not decided this case based upon an entirely new proceeding, but has operated on the theory which was rejected by this Court that its original proceeding in 1957 had been held to be substantially correct and that all that was necessary was to determine whether there was any substantial error in that decision or whether there are "strong countering public interest considerations" (R. 644) why a change in its allocations should now be made.[33] This reliance is completely misplaced, particularly in the light of the mandate of this Court.

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[33] It is true that in opposing a remand order for a completely new proceeding the Commission argued to this Court that:

> "Consideration of subsequent events might well have to include existing service to the public in St. Louis, which might place some parties in a more advantageous position than they originally held and be correspondingly disadvantageous to other parties." (Brief for the Federal Communications Commission in Case No. 13,992, dated May 27, 1961, p. 18)

(continued on following page)

This Court in Community Broadcasting Co. v. Federal Communications Commission, 107 U.S. App. D.C. 95, 274 F.2d 753 (1960), emphasized the extreme difficulty in securing a fair hearing when the Commission authorizes temporary television operation to one of several conflicting interests prior to a determination on the merits, even when the Commission expresses its determination to exclude the fact of that operation from consideration of the merits of the case. Here station KTVI has been under "temporary" operation for a period of five years, and the Commission has not only failed to state that it will not take into account that temporary operation but has expressly stated that this was a principal basis upon which the determination has now been made to assign Channel 2 to St. Louis. This proceeding must be remanded to the Commission with instructions to purge itself of any consideration of the existence of station KTVI in the course of its deliberations as to the merits of the case before it.

IV.

The Commission Erred in Its Rejection of the Contention of 220 Television, Inc. that St. Louis Cannot Support Four Commercial Television Stations.

In support of its position that Channel 2 should be assigned to Salem-Rolla rather than to St. Louis, 220 Television, Inc. urged (R. 323-26, 420-22) that the assignment to St. Louis would not even for the long term serve the Commission's stated objective of improving the

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33 (continued from preceding page)
The Commission may now contend that this cryptic assertion meant that the Commission believed that an order for a de novo proceeding would enable it to consider as a major factor in support of assigning Channel 2 to St. Louis the fact that following an unlawful earlier allocation order KTVI had been on the air for several years. But this Court did not rule upon or otherwise mention this Commission argument. And, since the basic position of the Commission was that the prior proceeding had not been a complete nullity, and since this Court expressly rejected that position, it is clear that the order of remand required that the merits of the Channel 2 allocation question should be decided without regard to any prior action the Commission had taken.

opportunities for competition among a greater number of stations in St. Louis. It based this contention upon the fact that despite its competent and aggressive management and its employment of facilities at least comparable with those of each of the other television stations in St. Louis, its station KPLR-TV had been unable to generate sufficient revenues to support itself.

In fact, 220 Television, Inc. showed that between April of 1959, when station KPLR-TV went on the air, and September 30, 1961, it had experienced an aggregate operating deficit of more than one million dollars with no foreseeable prospect that revenues would ever match expenses so long as the station faced competition from three commercial stations with each providing a full network schedule. Thus, 220 Television, Inc. pointed out, for the long run even with four commercial VHF assignments in St. Louis, only three stations could be expected to remain on the air.

The Commission rejected this contention. First it said that: "We find no basis in the record for a judgment that even four commercial outlets are sufficient to satisfy the diversified programming needs of the people in a market the size of St. Louis" (R. 643). We do not dispute this statement, considered theoretically and in a vacuum. We have previously pointed out, however, that the need of the people of the Salem-Rolla area for a first service greatly outweighs the need of the people in St. Louis for a fourth commercial and a fifth local television service. Moreover, a finding that there is a program "need" for a fourth commercial television station in St. Louis is irrelevant to the question whether as a practical matter the market can support a fourth station. If it cannot, then clearly there would be no point to making a fourth commercial assignment, particularly when there is a substantial demand for a station in Salem-Rolla.

The Commission next rejected the 220 Television, Inc. contention on the ground that a showing as to its operating losses was not a valid

index as to its chances of success, but that "the share of the revenue which a station is able to garner from the total revenues in a market is more indicative than its operating losses of its chances of success in a market." (R. 644)

This refusal to rely upon losses as indicative of the future outlook of a station represented an abrupt departure from settled Commission practice. The Commission has traditionally and consistently looked to losses sustained by its licensees in making such an evaluation. Thus, the very case here at issue was inaugurated originally in 1957 primarily on the basis of representations by Signal Hill that as the operator of a UHF station in the St. Louis area it had suffered losses for a number of years and saw no chance for survival. See Sangamon Valley Television Corp., 19 Pike and Fischer RR 1055, 1056b (1961); Springfield Deintermixture Case, 15 Pike and Fischer RR 1526, 1535 (1957). These representations were relied upon by the Commission and no reference was made to that station's "share" of revenues. For other cases in which operating losses have been relied upon as an indication of a station's future in the market, see Fresno Deintermixture Case, 15 Pike and Fischer RR 1586i, 1593 (1957); Tri-Cities Broadcasting Co., 23 Pike and Fischer RR 1045 (1962), and 24 Pike and Fischer RR 691 (1962); Capital Cities Broadcasting Corp., 24 Pike and Fischer RR 675 (1962). It is, after all, in the long run a station's ability to avoid losses and to make a profit which determines whether it will remain in operation.

But even if the Commission's statement that a station's "share of the revenue" is the more meaningful index of the station's life expectancy were correct, the Commission's holding on this point must be overruled because it relied upon information upon which it was not entitled to rely in this proceeding.

The Commission stated that:

> "The financial data which 220 Television submitted for its first full year of operation indicate that its share was not small considering the time its independent station had been in operation and in competition for audience and business with established network-affiliated stations." (R. 644)

But 220 Television, Inc. did not submit any "financial data" in this proceeding relating to revenues for "its first full year of operation." On the contrary, the only data submitted by 220 Television, Inc. to the Commission in that connection consisted of its annual financial report (FCC Form 324) which was filed in April 1961 and is maintained by the Commission in separate, confidential files. Moreover, not only was this financial report maintained on a confidential basis but the same was also true of the comparable financial reports filed for each of the other television stations in St. Louis. The Commission makes public only aggregate totals for each market.

As a consequence, it is completely impossible for 220 Television, Inc. to know what its "share of the revenue" was as compared with that of each of the other television stations in St. Louis. It is equally impossible for this Court to know. We submit that it was fundamentally unfair and contrary to law for the Commission to rely upon secret data, making it impossible for 220 Television, Inc. to challenge or for this Court to review the reasonableness of the Commission's analysis of that information. It is axiomatic that a conclusion based upon such unknown or secret evidence, and thus lacking the essential underlying findings, cannot stand. See, e.g., United States v. Baltimore and Ohio R. Co., 293 U.S. 454 (1935).

And the Commission's own Rules which are applicable to this case would appear to foreclose such use. Thus Section 1.218 of the Rules states that in rule making proceedings:

> "The Commission will consider all relevant comments and material of record before taking final action in a rule making proceeding and will issue a decision

> incorporating its findings and a brief statement of the reasons therefor." (Emphasis supplied)

Since the material upon which the Commission relied was not filed in the record and was secret, so that it could not even have been incorporated into the record by means of official notice, it is clear that the Commission went beyond what it said in Section 1.218 would be the scope of its investigation in reaching its determination with respect to the financial viability of four stations in St. Louis.

Finally on this point, all of the information available to 220 Television, Inc. indicates that the Commission's statement that the "share of the revenue" of 220 Television, Inc.'s station KPLR-TV was "not small" is without foundation in the secret files of the Commission. Thus in the annual financial report filed for KPLR-TV for the year 1960, clearly the year considered by the Commission,[34] 220 Television, Inc. reported total revenues of $938,399. The Commission's report, released August 28, 1961 (Public Notice 9229), of total television revenues for 1960 in St. Louis, showed that these total revenues amounted to $12,433,587. Thus the 220 Television, Inc. share of the revenues which the Commission said was "not small" amounted to approximately 8% of the revenues received by the four stations in St. Louis. In that same year 220 Television, Inc. reported operating losses of more than $500,000 while total operating profits of the other three television stations in St. Louis amounted to a total of more than $3,300,000.

We have no way of knowing how the KPLR-TV "share" compares with that of the least affluent of the remaining three television stations in St. Louis. Nor do we have any way of knowing how its "share" compares with the "share of the revenue" which was being experienced by station KTVI in St. Louis in 1957 when the Commission, relying upon its claims of operating losses, took the "extraordinary procedure" of

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[34] 1960 was the "first full year of operation" by KPLR-TV (see R. 644).

granting station KTVI "temporary" operating authority on Channel 2 in St. Louis. But we think it is clear that the Commission may not be permitted to rely solely upon a dubious analysis of secret information in support of its prognostication as to the economic future of St. Louis as a four station market.

CONCLUSION

In its concentration upon the confirmation of station KTVI in possession of Channel 2 in St. Louis the Commission has disregarded the proper standards for decision and has instead relied upon unlawful grounds. We ask that the case be returned to the Commission with instructions to conduct proper allocation proceedings as to Channel 2.

Respectfully submitted,

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January 17, 1963

APPENDIX

STATUTES AND REGULATIONS INVOLVED

Section 1 of the Communications Act of 1934, as amended, 48 Stat. 1064, 47 U.S.C. 151, provides in pertinent part:

> For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service . . . there is hereby created a commission to be known as the "Federal Communications Commission," which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this Act.

Section 307(b) of that Act, 47 U.S.C. 307(b), provides:

> In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.

Section 1.218 of the Rules and Regulations of the Federal Communications Commission, 47 CFR 1.218, provides:

> The Commission will consider all relevant comments and material of record before taking final action in a rule making proceeding and will issue a decision incorporating its findings and a brief statement of the reasons therefor.

REPLY BRIEF FOR PETITIONER
220 TELEVISION, INC.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,356

220 TELEVISION, INC., *Petitioner*,

v.

UNITED STATES OF AMERICA
and the
FEDERAL COMMUNICATIONS COMMISSION,
Respondents,

AMERICAL BROADCASTING-PARAMOUNT THEATRES, INC.,
SIGNAL HILL TELECASTING CORPORATION,
Intervenors.

On Petition for Review of a Report and Order
of the Federal Communications Commission

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TABLE OF AUTHORITIES

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* Cases or authorities chiefly relied upon are marked by asterisks.

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REPLY BRIEF FOR PETITIONER 220 TELEVISION, INC.

In our opening brief we set forth the basic errors which were, we believed, reflected in the Commission's opinion. The extensive responses to our brief have, we submit, served only to prove the need to reverse the Commission's opinion. In particular, the Department of Justice has filed a brief separate from that of the Commission, for the sole purpose of discussing what it admits is a "close question"

(p.2) as to whether the Commission properly construed the mandate of this Court which was the basis for the Commission proceeding now under review. We share the Department's interpretation of the mandate, and show hereafter that the Commission's opinion violates that mandate.

We have undertaken in this reply brief to disregard questions fully canvassed in our opening brief and matters which we have considered to be of relative insignificance.[1] This reply brief will therefore concern itself first with a showing that the arguments advanced in response to the 220 Television, Inc. claim that the Commission violated the Court's mandate serve only to establish the validity of that claim, and second with an analysis of the principal grounds upon which Commission counsel have based their defense of the Commission's assignment of Channel 2 to St. Louis rather than to the area of Salem-Rolla, Missouri. This analysis will show that Commission counsel are wrong in saying that the Commission gave proper consideration to the 220 Television representation that if Channel 2 were assigned to Salem-Rolla it would build and operate a station there, and will show that the effort to defend the refusal to assign Channel 2 to Salem-Rolla was based primarily upon two reasons which are mutually contradictory.

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[1] For example, we have not undertaken to answer in the body of this brief the extensive ad hominem remarks addressed to the motives of 220 Television, Inc. by intervenor Signal Hill. Of course the positions taken by private parties, including 220 Television, with respect to the issues are those best calculated to advance their private interests, and the question before the Commission was which private interests best accorded with those of the public. We do not suppose that Signal Hill, which has been found by the Commission and this Court to have engaged in extensive ex parte representations in support of its position, and which now seeks the assignment of Channel 2 to St. Louis in order to secure for the future the network-affiliated, major-market station it has possessed "temporarily" for the past six years, would seriously contend that its presentations have been other than designed to advance its private interests.

I. The Briefs of Respondents and Intervenors Serve Only to Emphasize the Commission's Error in Relying upon the "Temporary" Operation on Channel 2 at St. Louis in Support of the Decision to Assign the Channel There.

One consequence of the Commission's invalid decision in 1957 to assign Channel 2 to St. Louis was its grant of "temporary" operating authority to Signal Hill's station KTVI to operate on Channel 2 there. When this Court reversed the Commission's determination, primarily because of the numerous improper ex parte communications which had been made on behalf of KTVI, and remanded the case to the Commission for further proceedings, it authorized the maintenance of existing services pendente lite and as a result the Commission permitted the continued "temporary" operation of KTVI.

As we pointed out in our opening brief (see pp. 36-39), in its Memorandum Opinion and Order which was released following the completion of the new proceedings, the Commission acted as though Channel 2 were actually assigned to St. Louis and relied heavily in support of the "retention" of the channel there upon the fact that station KTVI had for approximately five years been operating "temporarily" on the channel in St. Louis. We pointed out that this was contrary to the Court's mandate in the prior proceeding, which had ordered completely new proceedings with respect to the proposal to move Channel 2 away from Springfield, Illinois, its original place of assignment, and which had been designed to neutralize to the fullest extent possible the effects of KTVI's ex parte activity.

The two respondents and the intervenor Signal Hill, the only parties who have undertaken to support the Commission's opinion in this regard, have all given either express or tacit recognition to the force of our argument. The Department of Justice, which has submitted a separate brief rather than concurring with the Commission in a single brief, has taken this unusual step with the acknowledgment that it does not concur with the Commission's views on this question, but, while

agreeing that the Commission's opinion is sustainable, considers that this is a "close question." And both the Commission (Brief, pp. 62-66) and Signal Hill (Brief, pp. 18-21) have attempted to minimize the importance placed by the Commission in its opinion upon the present operation of KTVI in St. Louis, thereby all but admitting that it would be error for the Commission to place decisive weight upon the temporary authority granted to station KTVI to operate in St. Louis.

We agree with almost everything the Department of Justice has said about this except its final conclusion. In particular we agree with the following:

> "Clearly, placing a burden upon those who would move Channel 2 from St. Louis would be contrary to the Court's instruction to make a current determination whether and where it should be moved from Springfield. Moreover, it would be contrary to the other ground of the remand, the need to eliminate any lingering effects of the improper ex parte contacts by the St. Louis interests. Nor should the fact that this Court gave the Commission discretion to maintain existing services have the effect of creating a presumption in favor of keeping Channel 2 in St. Louis" (p. 13; emphasis in original).
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> "Both in 1959 and 1961, the Court allowed the existing service of Channel 2 to be maintained in St. Louis presumably because of the equitable consideration that if the Commission were to come to the same result as it validly could using proper criteria, and [the] public interest in both Springfield and St. Louis would not have been served by a further temporary dislocation pending such redetermination. In discussing temporary authorizations in the context of an adjudicative proceeding, it has been emphasized that no weight is to be given such temporary service when the Commission makes its eventual choice between competing applicants. Community Broadcasting Co. v. Federal Communications Commission, 107 U.S. App. D.C. 95, 274 F.2d 753. By the same token, it could not have been the Court's intent, in allowing maintenance of service in this case, to create interests which would weigh against putting Channel 2 anywhere but St. Louis" (note 1, pp. 13-14).

The Department then proceeds to state that while "the question is close, we do not believe that the Commission has transgressed the mandate of this Court" (Brief, p. 14). But we believe that it is self-evident from the Commission's opinion itself that, in the words of the Justice Department, the Commission has placed a burden upon those who would move Channel 2 from St. Louis, has in effect created a presumption in favor of keeping Channel 2 in St. Louis, and has caused the creation of interests as a result of the maintenance of service pendente lite to weigh against putting Channel 2 anywhere but St. Louis. In fact, we believe that the Commission's opinion, pertinent excerpts from which are set forth below, clearly establishes that in the Commission's view the action of this Court in permitting KTVI to remain on the air in St. Louis pendente lite has given rise to the critical factor favoring retention of the channel in St. Louis. Thus:

> ". . . Channel 2 is now providing a needed service to the public in the St. Louis area; and it will shortly provide Terre Haute with a needed second local VHF service . . . In these circumstances, there would have to be strong countering public interest considerations to lead to a conclusion to use Channel 2 at Springfield at this time" (R. 640).
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> "As a by-product of not using Channel 2 at Springfield, the channel may continue to be used at St. Louis to provide that area with a fourth commercial VHF local service. It may also be used to provide Terre Haute with a second local VHF service, thus creating practical opportunities for the public in both of these VHF areas to have a greater choice of competitive television service. The channel could also be used in the Rolla-Salem area, if not used at St. Louis, to provide that area with a first VHF service. We believe, however, that public interest considerations require the continued use of Channel 2 at St. Louis" (R. 641; emphasis supplied).
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> * * * * * * *
>
> "The competitive service provided by Station KTVI for the last five years in the [St. Louis] area would also, it is apparent, create a great void if deleted. Thousands of people in both Illinois and Missouri depend upon it for a choice of television service" (R. 644).

* * * * * *

> "An additional and important consideration [against assigning Channel 2 to Salem-Rolla] is that Channel 2 could not be used in the Salem-Rolla area without depriving a large area and population in Illinois and Missouri of a needed competitive service which they have been receiving for the past five years from the Channel 2 station in St. Louis" (R. 646).

* * * * * *

> "We are of the view that the continued use of Channel 2 at St. Louis instead of in the Rolla-Salem area thus serves the public interest and this objective" (R. 646; emphasis supplied).

Nothing, we submit, could be clearer than that the Commission placed an impossible burden upon the advocates of any position other than the retention of Channel 2 in St. Louis. Of course, the operation of station KTVI in that city for the past several years, particularly with a major network affiliation, has caused audiences in that area to rely upon service from the station. It could hardly be otherwise. But if the Commission had not permitted the "temporary" operation of station KTVI as a consequence of the proceeding which was tainted by KTVI's ex parte communications no such reliance would have been created. By the same token if the Commission had assigned Channel 2 to Salem-Rolla and a station had been built there it can hardly be denied that the more than 200,000 persons to be served by such a station and the some 60,000 to 90,000 persons who would receive their only service from such a station would have come to rely upon that service and that the removal of that service would "create a great void." Thus the only facts quoted above upon which the Commission relied were those which necessarily and inevitably flowed from its "temporary" grant of authority to KTVI which this Court permitted to continue solely pending the outcome of this proceeding. To permit those facts to have decisional weight in the outcome on the merits is to attribute substantial validity to the Commission's original determination and to permit

KTVI to profit for the indefinite future[2] from the very ex parte conduct which has permitted it to act as a network-affiliated station in St. Louis for the past six years.

In attempting to justify the Commission's reliance upon that operation Commission counsel have argued that since "the invalidation of the Commission's original order assigning Channel 2 at St. Louis was not the fault of the public, they should not be penalized because of it" (Brief, p. 66). But the determination that no weight should be given to the KTVI temporary operation would not penalize the public. It would mean only that the Commission would be required to make an allocation based upon an evaluation of future needs not upon the fact that one part of the public -- that living in the St. Louis area -- had benefited for the last six years at the expense of that part of the public living in the Salem-Rolla area. We do not see that any equities as to future allocation should accrue to the St. Louis public because they have in the past enjoyed "temporary" service pendente lite. The Commission is saying that because the public in the Salem-Rolla area have been deprived of service in the past, they should continue to be without service in the future. This doctrine is inconsistent with Section 307(b) of the Act. Clearly it would be contrary to the public interest to penalize the public in the Salem-Rolla area because station KTVI had engaged in improper ex parte conduct in 1957.

In our view the principal effort of both the Commission and of Signal Hill is to attempt to minimize the importance placed by the Commission upon the temporary operation of station KTVI in reaching its decision. Thus Signal Hill states that the Commission placed no particular weight upon that factor (Brief, p. 18) and Commission counsel assert first that this was "merely a cumulative factor" (Brief, p. 62)

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[2] As Commission counsel have advised the Court, the Commission has now granted Signal Hill a regular license for Station KTVI, subject only to the outcome of this case.

and then that even if it was error to take that service into account "we submit that the limited importance attached by the Commission to the loss of that service by St. Louis does not warrant reversal" (pp. 66-67). But the Commission itself said that this was an "important" factor (R. 644) and the multiplicity of its references to it emphasizes the importance expressly attached by the Commission upon it. In the Community case[3] this Court indicated the difficulty of eliminating the factor of temporary operation from consideration even when the Commission set about expressly to do so. Here the Commission has admitted that this was an important factor. There is no indication in the opinion that in the absence of this factor the Commission would have decided the case in the same way. Therefore, Commission counsel cannot be heard to argue that it was merely cumulative or that the error was harmless.

II. Commission Counsel Have Been Unsuccessful in Their Efforts to Defend the Refusal to Assign Channel 2 to Salem-Rolla.

In our opening brief we pointed out that the assignment of Channel 2 to St. Louis rather than to Salem-Rolla was contrary to the consistent interpretations by both the Commission and the courts of the mandate of Section 307(b) of the Communications Act, 47 U.S.C. 307(b), requiring a fair, efficient and equitable distribution of television facilities among the several states and communities. An assignment to Salem-Rolla would provide a first local television station for that area, would provide a first Grade B or better service to between 60,000 and 80,000 persons and would provide a second Grade B or better service to approximately 90,000 persons. On the other hand, assignment of Channel 2 to St. Louis would provide only a fourth commercial and a fifth local service for that community and would provide neither a first

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[3] Community Broadcasting Co. v. Federal Communications Commission, 107 U.S. App. D.C. 95; 274 F.2d 753 (1960).

nor a second Grade B or better service to any persons or areas.

We showed that the section of the Commission's opinion which dealt with this subject was incomplete and inconsistent and wholly failed to justify the Commission's action in making a determination contrary to all of the priorities which it had established and followed for the past decade. And we pointed to the Commission's failure to give any consideration to the fact that 220 Television had made a firm commitment to build and operate a station on Channel 2 at Salem-Rolla. Instead, without even mentioning that commitment, the Commission held that Channel 2 could not be put to effective use in that area.

In their brief Commission counsel argue that the Commission gave appropriate consideration to the commitment of 220 Television, Inc. And their attempt to defend the Commission's failure to discuss or apply the priorities consists essentially of efforts at confession and avoidance. They contend that the refusal to assign Channel 2 to Salem-Rolla was defensible on the following two related grounds: (a) that assignment of Channel 2 to Salem-Rolla would be inconsistent with the public interest because it would tend to establish a "monopoly" of television service in that area, and (b) that withholding assignment of Channel 2 from Salem-Rolla would ultimately produce a more fair, efficient and equitable distribution of facilities through the development of several UHF stations in that area. We shall show below that these arguments are wholly fallacious.

1. In its opinion the Commission stated that:

> "We considered a proposal to assign Channel 2 to the Salem area in the 1957 Springfield deintermixture proceeding. One of our reasons for rejecting it was that we did not feel that the channel could be put to effective use in or near this relatively small community. We are still of that view and feel that, <u>if and when</u> this area can support a local television service, such service could and should be provided in UHF" (R. 645; emphasis supplied).

And, as we showed in our opening brief (p. 30), a principal basis upon which the Commission in 1957 decided that Channel 2 could not be put to effective use in the Salem area was that no party had indicated that it would apply for the channel there.

But in the 1962 proceeding, 220 Television, Inc. made a firm representation that it would apply for, build and operate a station at Salem-Rolla on Channel 2.[4]

Commission counsel have said the following in their brief:

> "In this case, it is clear that the Commission did not disregard 220 Television's representation, but fully considered its proposal (R. 644-646). Since it determined on other proper grounds that Channel 2 should not be assigned to Rolla-Salem, its failure to accord 220 Television's representation decisive weight was not arbitrary" (p. 56).

But we do not see how it can be "clear that the Commission did not disregard 220 Television's representation" when no mention of that representation was made either in the section of the opinion cited by Commission counsel above or in any other section and when the Commission expressly laid bare a doubt that the channel could be put to effective use in the Salem-Rolla area and said that television's future in that area was in an "if and when" status. We submit that in this context the failure of the Commission to make any mention of the 220 Television representation resulted either from having overlooked and therefore being unaware of it, or from the Commission's inability to take that factor expressly into account and still enunciate a finding that the channel could not be put to effective use in the Salem-Rolla area. On either basis this was reversible error.

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[4] And there can be no a priori doubt of the feasibility of this proposal. Certainly none was expressed in any of the comments in this proceeding, and, as shown by Appendix A to this brief, the Commission has made VHF assignments to more than 100 communities with populations of 15,000 or less and 41 of those assignments are now occupied by operating television stations. Salem and Rolla have a combined population of slightly more than 15,000 persons.

2. The Commission's "monopoly" theory would be untenable as a matter of law, even if it were solidly based on fact. Thus the theory apparently is that Channel 2 should not be assigned to Salem-Rolla because it would stifle UHF development and become the only television station in that area and thus a "monopoly," whereas it is the Commission's view that there should be a multiplicity of television service. But as we have pointed out in our opening brief (pp. 18-28), a long line of Commission opinions, as affirmed by this Court, for example, in Television Corporation of Michigan, Inc. v. Federal Communications Commission, 111 U.S. App. D.C. 101; 294 F.2d 730 (1961), have established that under Section 307(b) of the Communications Act the providing of a first service and a first outlet of local self-expression is far more important than providing multiple services. The Commission's fear of "monopoly" obviously cannot stand in the face of this mandate. Nor has its practice been to refuse first services until multiple services can be made available. On the contrary, there are numerous television stations, particularly VHF stations, assigned as the only stations in their communities and areas.[5]

Moreover, an analysis of the possible additional channels whose potential the Commission said should be protected by keeping Channel 2 out of the Salem-Rolla area shows that its refusal to assign the channel to Salem-Rolla is wholly inappropriate to its stated purpose.

As shown by Commission counsel's brief (see pp. 48-49), the only three UHF channels in question are Channel 46 at Rolla, which the Commission has recognized has remained unused since its assignment in 1952, and Channel 15 at Poplar Bluff and Channel 20 at West Plains.

There can hardly be complaints based solely on the replacement of unused UHF Channel 46 by Channel 2. That would constitute a

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[5] See, for example, Appendix A to this brief which lists more than 40 stations in communities having 15,000 persons or less, each station being the only station in its community.

replacement which, as the Commission itself recognizes (Brief, p. 48), would provide broader service and which would also permit the immediate building and operation of a station there. It is exactly this addition of a VHF channel in the place of dormant UHF channels which the Commission has proposed to accomplish, for example, in both St. Louis and Terre Haute in this very proceeding.

Thus the refusal to assign Channel 2 to the Salem-Rolla area must be based upon the desire to protect the possible development of Channel 15 at Poplar Bluff and Channel 20 at West Plains. But those two locations are, as Commission counsel have stated in their brief (see p. 49), approximately 85 and 90 miles, respectively, from Salem and Rolla.[6] This is approximately the same distance as Springfield and the Salem-Rolla areas are from St. Louis, in different directions, and there has been no suggestion that the proposed Channel 2 station would provide service to either the Poplar Bluff or the West Plains areas. Instead, 220 Television specifically showed that it would not provide any Grade B overlap of the Grade B signal of station KPOB-TV at Poplar Bluff (see R. 440), and neither the licensee of that station nor any present or proposed licensee of the UHF translators or any proposed television broadcast station at either Poplar Bluff or West Plains participated in the proceeding before the Commission to oppose the assignment of Channel 2 to that area or otherwise indicated any opposition to it. The Commission in its opinion made no finding, as distinguished from its bare conclusion that Channel 2 would become a "monopoly," as to the nature or extent of any impact that the proposed Channel 2 station at Salem-Rolla would have upon UHF operations in either the Poplar Bluff or the West Plains areas. There is thus no basis for any conclusion that the operation of a station on Channel 2 at

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[6] But Commission counsel claim in their brief (pp. 52-53, note 25) that "the critical problem in UHF competitive survival is the presence of a VHF station in the same community."

Salem-Rolla would or could reduce the number of television stations which would operate in that general area.

3. Moreover, and if possible even more important, any speculation that operation of Channel 2 at Salem-Rolla would inhibit the operation of UHF stations 85 or 90 miles away necessarily flies directly in the face of the Commission's fundamental finding with respect to the Salem-Rolla proposal. This was that, despite the fact that numerous VHF signals are received from distant stations in the Salem-Rolla area that area can and should rely upon UHF development to meet its television needs.

The Commission made the following findings with regard to VHF fringe area penetration of the Salem-Rolla area (R. 644-45):

a. Jefferson City, Missouri, in which VHF station KRCG is located is approximately 52 miles from Rolla and approximately another 25 miles from Salem. KRCG places a Grade B signal over Rolla and with maximum facilities would place one over Salem.

b. The area is approximately 95 miles from St. Louis.

c. In the county in which Rolla is located approximately 84% of the homes are estimated to have television receivers and in the county in which Salem is located approximately half of the homes have television. In each of these counties more than half of the television homes can receive the three St. Louis network-affiliated stations, 96% can receive station KRCG and 85% can receive station KOMU at Columbia, Missouri.[7]

d. The Commission gave no indications of any kind that any UHF service is available or utilized in the Salem-Rolla area to be served by Channel 2.

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[7] KOMU-TV operates on VHF Channel 8; Columbia is approximately the same distance from the Salem-Rolla area as is St. Louis.

The Commission on the basis of these findings stated that: "It would therefore appear that there is a considerable amount of [VHF] television service available in this area" (R. 645). But the Commission went on to say that: "There appears to be no reason why Channel 46, assigned to Rolla, cannot be effectively used to provide local service in the Rolla-Salem area. The letters received from residents of the area indicate that reception of VHF signals from other cities is not too satisfactory, and it would appear that they would pose no real competitive handicap to a local UHF operation" (R. 645).

But this statement is totally inconsistent with the Commission's finding that establishment of Channel 2 at Salem-Rolla would prevent the development of UHF stations 85 and 90 miles away. If, indeed, the operation of station KRCG, which is only approximately 52 and 75 miles away from Rolla and Salem, respectively, and which actually places a calculated Grade B signal over Rolla would not, combined with the four other VHF signals which penetrate to one extent or another the Salem-Rolla area, impose a "real competitive handicap to a local UHF operation," then it is perfectly clear that the operation of Channel 2 could not impose such a handicap to stations 85 and 90 miles away. On the other hand, if it would cause such competitive impact upon the development of stations at those distances, then it is self-evident that the operation of stations KRCG and the other four stations which penetrate portions of the area would pose at least as great a competitive threat to the development of UHF in Salem-Rolla.

The Commission simply cannot rely upon both of these arguments at the same time. Either Channel 2 would not inhibit UHF development 85 to 90 miles away, in which case the "monopoly" argument is wrong, or UHF cannot develop in Salem-Rolla, in which case the Commission's efforts to reconcile its action with Section 307(b) of the Act through reliance upon UHF to serve Salem-Rolla must be rejected. In either case the Commission's opinion must be reversed.

In our view what the Commission has in effect said when it stated that: "[w]e...feel that, if and when this area can support a local television service, such service could and should be provided in UHF," is that the Salem-Rolla area was being relegated to a position of secondary consideration and that either because the Commission had overlooked the fact that 220 Television had made a firm commitment to build a station there or for some other reason, the Commission felt that television service for the Salem-Rolla area should be postponed for the indefinite future, and perhaps forever, in order that an immediate assignment could be made to St. Louis. This determination was contrary to Section 307(b) of the Act and must be rejected.

CONCLUSION

We submit that on the basis of the record before the Commission there was no choice but to make the assignment to the Salem-Rolla area. But if the Court should feel that it does not desire to issue specific instructions to that effect, then the only alternative, in our view, would be to remand the case to the Commission for further proceedings which would involve compiling a new record in the form of additional comments to the extent that the parties would wish to present them. It is our view that the Commission has no choice but to assign Channel 2 to the Salem-Rolla area. But, at the very least, it cannot make the assignment which it made to St. Louis based upon the record which was before it.

Respectfully submitted,

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April 9, 1963

APPENDIX

Tabulation of Existing Commercial VHF Television Assignments in Cities Having Populations of 15,000 Persons or Less[1]

Location	1960 Population[2]	Commercial VHF Channels Assigned[3]
ARIZONA		
Douglas	11,925	3 *
Kingman	4,525	6
Nogales	7,286	11
Prescott	12,861	7
CALIFORNIA		
Alturas	2,819	13
Chico	14,757	[12]
Redding	12,773	[7], 9 *
COLORADO		
Alamosa	6,205	3
Durango	10,530	6
Lamar	7,369	12
Montrose	5,044	[10]
Sterling	10,751	3
IDAHO		
Caldwell	12,230	9
Lewiston	12,691	[3]

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[1] Based on Section 3.606 of the Commission's Rules and Regulations ("Table of Assignments"), as amended through February 11, 1963 (47 CFR 3.606). Assignments in Alaska, Hawaii and United States possessions are excluded from the instant tabulation.

[2] Taken from "County and City Data Book" (United States Department of Commerce, 1962), Appendix A, Table A-2, pp. 581-611.

[3] Channels with operating stations, as reported by the "Television Factbook" (1962-63 Edition), and as reflected by the Commission's files, are indicated by brackets. Channels for which construction permits have been issued but which presently have no stations in actual operation are depicted by underscoring. Similarly, channels for which applications for construction authority have been filed but have not been granted are shown by asterisks. Information in this table was checked for accuracy with data maintained by the Commission in its public files, as corrected through March 7.

Location	1960 Population	Commercial VHF Channels Assigned
KANSAS		
Dodge City[4]	13,520	[6]
Garden City	11,811	[11], 13 *
Goodland	4,459	[10]
Hays	11,947	[7]
MAINE		
Calais[5]	4,223	7 *
Presque Isle	12,886	[8]
MICHIGAN		
Alpena	14,682	11
Cadillac	10,112	[9]
Calumet	Less than 2,500	5
Cheboygan	5,859	[4]
Iron Mountain	9,299	8
Ironwood	10,265	12
Parma-Onandaga	Combined population less than 5,000	[10]
MINNESOTA		
Alexandria	6,713	[7]
Bemidji	9,958	9
International Falls	6,778	11
Walker	Less than 2,500	12
MISSOURI		
Kirksville	13,123	[3]

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[4] Pursuant to Section 3.607(b) (47 CFR 3.607(b)) of the Commission's Rules and Regulations, a channel assigned to a community in the Table of Assignments is available for use under certain circumstances in any unlisted community located within 15 miles of the community of assignment. The instant tabulation, however, is based entirely on and includes only those communities specifically having assignments under Section 3.606. For example, in Kansas, Channel 6 is actually being used in Ensign (1960 population: less than 2,500) which is located within 15 miles of Dodge City (1960 population: 13,520), the city of assignment under Section 3.606 of the Rules. Accordingly, this table depicts Channel 6 as being assigned to the larger community. In some instances, the community of assignment of a station is of insignificant size but due to its location may serve a substantial population. See, e.g., assignment of Channel 10 to Parma-Onandago, Michigan.

[5] Assignment of Channel 7 to Calais, Maine, was stayed by order of the Commission (FCC 62-227) on February 21, 1962.

Location	1960 Population	Commercial VHF Channels Assigned
MONTANA		
Anaconda	12,054	2
Glendive	7,058	[5]
Hardin	2,789	4
Havre	10,740	9, 11
Kalispell	10,151	9
Lewistown	7,408	13
Miles City	9,665	3, 10
NEBRASKA		
Albion	Less than 2,500	8
Hay Springs	Less than 2,500	[4]
Hayes Center	Less than 2,500	[6]
Kearney	14,210	[13]
McCook	8,301	[8]
Scottsbluff	13,377	[10]
NEVADA		
Boulder City	4,059	4
Elko	6,298	10
Ely	4,018	3, 6
Goldfield	Less than 2,500	5
McGill	Less than 2,500	8
Tonopah	Less than 2,500	9
Winnemucca	3,453	7
NEW MEXICO		
Gallup	14,089	3, 10
Silver City-Truth or Consequences	12,241 (combined)	6
NEW YORK		
Carthage	4,216	[7]
Lake Placid	2,998	5
Vail Mills	Less than 2,500	[10]
NORTH CAROLINA		
Washington	9,939	[7]
NORTH DAKOTA		
Devils Lake	6,299	8, 14
Dickinson	9,971	[2], 4
Pembina	Less than 2,500	[12]
Valley City	7,809	[4]
Williston	11,866	[8], 11

Location	1960 Population	Commercial VHF Channels Assigned
OKLAHOMA		
Ada	14,347	[10]
Elk City	8,196	[8]
OREGON		
Brookings	2,637	8
Coos Bay	7,084	[11]
La Grande	9,014	13
Roseburg	11,467	[4]
SOUTH DAKOTA		
Huron	14,180	12
Lead	6,211	[5]
Mitchell	12,555	[5]
Pierre	10,088	10
Reliance	Less than 2,500	[6]
Watertown	14,077	[3]
TEXAS		
Alpine	4,740	[12]
Boquillas	Less than 2,500	8
Brady	5,338	13
Fort Stockton	6,373	5
Marfa	2,799	3
Monahans	8,567	[9]
Presidio	Less than 2,500	7
Sonora	2,619	11
Sweetwater	13,914	[12]
UTAH		
Cedar City	7,543	5*
Price	6,802	6
Richfield	4,412	13
Vernal	3,655	3
VIRGINIA		
Harrisonburg	11,916	[3]
WEST VIRGINIA		
Weston	8,754	[5]

Location	1960 Population	Commercial VHF Channels Assigned
WYOMING		
Lander	4,182	7
Rawlins	8,968	11
Riverton	6,845	[10]
Rock Springs	10,371	13
Sheridan	11,651	9, 12

TOTALS:

Assigned:	105
Operating:	41
Construction Permits Granted:	5
Applications Pending:	5

BRIEF FOR INTERVENOR SIGNAL HILL TELECASTING CORPORATION

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,356

220 TELEVISION, INC.
Petitioner

v.

UNITED STATES OF AMERICA and the FEDERAL COMMUNICATIONS COMMISSION
Respondents

AMERICAN BROADCASTING-PARAMOUNT THEATRES, INC.
SIGNAL HILL TELECASTING CORPORATION
Intervenors

No. 17,380

SANGAMON VALLEY TELEVISION CORPORATION,
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UNITED STATES OF AMERICA and the FEDERAL COMMUNICATIONS COMMISSION
Respondents

STATE OF ILLINOIS, ET AL
Intervenors

Petitions For Review of a Report and Order of the Federal Communications Commission

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QUESTIONS PRESENTED

The stipulated statement of questions presented is correctly stated by Appellants 220 Television, Inc. and Sangamon Valley Television Corporation in their respective briefs.

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BRIEF FOR INTERVENOR SIGNAL HILL TELECASTING CORPORATION

COUNTERSTATEMENT OF THE CASE

1. *The 1957 Deintermixture Proceedings*

The original deintermixture proceedings (Docket No. 11747) culminated on March 1, 1957 in an Order amending Section 3.606 of the Commission's rules by deleting Channel 2 from Springfield and assigning it to St. Louis, Missouri, and Terre Haute, Indiana. At the same time a temporary authorization was issued to Signal Hill to operate on Channel 2, pending the outcome of a comparative hearing with Louisiana Purchase Company, another applicant for construction permit in St. Louis (R. 630).

Subsequently, on April 2, 1958, after hearing, the Commission approved a merger between Signal Hill and Louisiana Purchase, and granted Signal Hill a construction permit for regular operation on Channel 2 in St. Louis, which superseded the earlier temporary authorization. (R. 630)

Meanwhile, Sangamon Valley Television Corporation petitioned this court for review, claiming the deintermixture of Springfield had violated Sec. 307 (b) of the Communications Act. On May 1, 1958, the Commission action was affirmed, this court finding "nothing arbitrary, capricious or otherwise illegal in the decision." *Sangamon Valley Television Corp.* v. *United States*, 103 U. S. App. DC 113, 255 F. 2d 191.

Sangamon Valley petitioned the Supreme Court for certiorari. On the basis of representations by the Solicitor General and Commission Counsel that various parties had apparently made ex parte presentations while the proceeding was pending, the Supreme Court granted certiorari, vacated the judgment of this court, and remanded the case for appropriate action. *Sangamon Valley Television Corporation* v. *United States*, 358 U.S. 49.

On remand from the Supreme Court, this court vacated the order of March 1, 1957, and remanded the case to the Commission for a determination as to the nature and source of all ex parte pleas. (106 U.S. App. D. C. 30, 269 F.2d. 221)

2. *Decision of Judge Stern and the Commission on the Ex Parte Issues*

On remand from this Court, the Commission designated Judge Horace Stern as special hearing examiner to consider the nature and effect of the ex parte presentations that had been made.

In his Initial Decision of March 11, 1960, Judge Stern held that the deintermixture order was "voidable," requiring further action, 19 Pike & Fischer RR.1055. However, Judge Stern also held that "no member of the Commission should be required to disqualify himself," ibid. p. 1074, and that "the conduct of no party was such as to disqualify it," ibid. p. 1074. Referring specifically to the presentations made by an officer of Signal Hill, Judge Stern found that they were made (ibid. 1073, Finding of Fact, 22):

> "in the honest belief that there was nothing illegal or improper in so doing in a rule-making proceeding, a view more or less generally held at the time by members of the industry, by other interested parties, by public officials, and apparently by lawyers as well."

The Commission in its Report and Recommendation of February 16, 1961, adopted the bulk of Judge Stern's Initial Decision, including his conclusion that no member of the Commission was disqualified to participate in the further proceedings and that the conduct of no party was such as to disqualify it. 19 Pike & Fischer R.R. 1055.

As to the nature of the further proceedings, the Commission's Report and Recommendation proposed merely to

afford "parties the opportunity to respond to any matter" that had been the subject of ex parte discussions not otherwise made a part of the public record, stating that the Commission "does not desire, nor would it consider, comments on matters occuring subsequent to March 1, 1957."

3. *The Remand Order of July 27, 1961*

On reviewing this Report and Recommendation, this Court held that it was "unnecessary for the Commission to reconsider the conclusion expressed in its Report and Recommendation of February 16, 1961, that no Commissioner is disqualified and no party is absolutely disqualified."

The only change ordered by this Court related to whether a de novo proceeding should be instituted rather than merely (1) allowing parties to make replies to matters that had been presented off the record and (2) excluding matters occuring after March 1, 1957. The Department of Justice urged that since a new evaluation had to be made it would be "contrary to the public interest to decide the deintermixture question without consideration of the changes that might have occurred since 1957."

The Court, apparently accepting the position of the Department of Justice, held that "a fresh start is necessary" noting (111 U.S. App. D.C. 113, 294 F. 2d 742)

> "it would not be appropriate for the Commission to determine in 1961 on the basis of a somewhat supplemented 1957 record where and to whom VHF Channel 2 ought to be assigned."

4. *The De Novo Proceedings*

On September 11, 1961, a de novo notice of proposed rule making was issued. Sangamon Valley and the State of Illinois filed comments contending Channel 2 should be in Springfield, Illinois (R. 288, 283). Plains Tele-

vision Corporation, WTVP Metropolitan Broadcasting Corporation and American Broadcasting contended it should be deleted and assigned to Terre Haute and St. Louis. (R. 451, 273) The Terre Haute parties supported the assignment of Channel 2 to that city and Signal Hill supported the assignment to St. Louis. (R. 161)

220 Television, Inc. became a party to the new proceedings for the first time. It had not participated in 1957. It contended that St. Louis could not support four commercial stations, because, as the operator of the St. Louis independent (i.e. nonnetwork) station, it had sustained heavy losses in 1960. *220 Television, Inc. submitted no other data besides these losses; it did not discuss the fact that eight other communities had four commercial television stations nor did it attempt to explain in what respects St. Louis was different from these other communities, six of which were of comparable or smaller size, and which did support four stations.* (R. 321, 420)

220 Television also submitted a new proposal that Channel 2 be assigned to Salem-Rolla rather than St. Louis. It submitted engineering claiming that such a station would serve a white area of 100,080 people (R. 333). Channel 46 is presently allocated to Rolla. But 220 Television Inc. did not present any data to show the white area that would be served by a station operating on Channel 46. Nor did it attempt to explain why that Channel could not be used to also serve Salem and Rolla. It merely represented that if Channel 2 were assigned to Rolla, it would build and operate a station on that channel. It made no showing that Rolla and Salem could at this time economically support a local station.

Reply Comments and letters were also filed by Salem-Rolla residents supporting the assignment of Channel 2 to that area. These comments and letters contained no representations showing that Rolla-Salem could actually

support a local station. They merely stated that a local station was needed because reception from out of town stations was poor and undependable, and because such station would provide local programs. (R. 477-601, *passim*)

In its reply comments, Signal Hill showed that 220 Television, Inc.'s engineering was faulty, since it omitted to show service from an existing Jefferson City station, thus grossly overstating the supposed white area that a Channel 2 station would serve. (R. 346 at 360) Signal Hill showed that, by its engineer's calculations, the white area population that a Channel 2 station would serve was only 25,441 people, rather than the 100,080 people shown in the faulty engineering submitted by 220 Television, Inc.'s engineer. (R. 346 at 360; 376-382) 220 Television, Inc. did not immediately correct its original comments but waited until the time for its Reply Comments, when it purported to correct its original erroneous white area estimate of 100,080 people and instead showed an area of only between 39,440 and 84,370 people (R. 433).

Signal Hill also showed that (1) a station on UHF Channel 46 at Rolla would serve a white area of 18,860 people, or only 6,581 people less than a VHF Channel 2 station; and (2) that UHF stations from West Plains and Poplar Bluff would not only cover these 6,581 people but would reach another 23,380 people without present service who would not be reached by a Channel 2 operation at Salem-Rolla. (R. 346 at 383, 384)

With respect to the ability of St. Louis to support four commercial stations, Signal Hill's Reply Comments showed the following: Eight communities besides St. Louis, six of which are of comparable or smaller size, have four television stations (R. 346 at 394, 412). 220 Television, Inc.'s KPLR was "the newest of these independents and thus had not had as much time to build up audience,

revenue and acceptance." (R. 392). Thus, while KPLR in March 1961 had only built up to 5.5% of the evening audience, independents in other cities on the air longer had built up to from 8.4% to 14.1% (R. 415). The St. Louis area moreover had shown steady growth trends, indicating that, for the future, increased rather than less potential economic support could be expected for television stations in the area. (R. 411) Also included was the sworn statement of an experienced radio and television station broker, that he could readily obtain at least $2,500,000 for KPLR-TV. (R. 391)

The Commission, by Report and Order released July 20, 1962, concluded that Channel 2 should be assigned to St. Louis and Terre Haute and decided against the proposal to assign the channel to Salem-Rolla. These petitions for review followed.

SUMMARY OF ARGUMENT

1. The record as a whole amply supported the Commission's conclusion that St. Louis could support four commercial television stations. Eight other communities were shown to have four commercial stations, six of which were in size comparable to or smaller than St. Louis. As the most recently established independent station, KPLR in St. Louis had 5.5% of the evening audience while independent stations elsewhere which had been longer on the air had increased their shares to from 8.4% to 14.1%. St. Louis was also shown to be in a period of growth so that increased rather than less economic support may be expected for stations in St. Louis. The Commission was not arbitrary or capricious in holding that from all the evidence available to it there was no merit to the claim that St. Louis could not support at least four commercial stations.

2. The Commission did not rely on "secret" data in finding that 220 Television's share of the revenue was "not

small" considering the short time it had been on the air. The total St. Louis reported revenues for 1960 were not a secret, and 220 Television, Inc. knew what it had reported as its own revenues. There was no violation of any privileged communication in the Commission's use of these figures.

Nor did the Commission depart "from settled practice" in considering factors other than mere losses. For, in the precedents cited by 220 Television, Inc., the Commission had considered not merely the fact that losses had been sustained but the reasons for such losses. Here, in the light of all the facts of record, the Commission was correct in refusing to accept the mere fact of operating losses in 1960 as demonstrating the inability of St. Louis to support four commercial stations.

3. The Commission committed no error in taking cognizance of the existing service on Channel 2 in St. Louis. The July 27, 1961 decision of this court contemplated that the Commission consider the actual situation existing in 1961 rather than the facts as they existed in 1957. *Community Broadcasting Co.* v. *Federal Communications Commission*, 107 U.S. App. D. C. 95, 274 F. 2d 753 is not apposite. There, the Court cautioned against permitting a temporary operation by one of two competing applicants, lest the change in position by the temporary operator subconsciously weigh in the balance in favor of such operator. Here, there is no prospective operation. Rather there are, as accomplished facts, existing UHF services being used by the public in central Illinois and an existing VHF service used by the public in the St. Louis area. To the extent that the Commission purported to give weight to the existence of service on Channel 2 in St. Louis, it was not concerned with the private interest of Signal Hill Telecasting by virtue of its investment in KTVI but solely with the public interest of the St. Louis populace in the service it has actually been receiving. In weighing

the public interest, the Commission could properly consider the impact of its decision, not on the private investment of KTVI, but on the populace receiving its service.

4. There was ample evidence in the record that the existing VHF services to Salem-Rolla would be no handicap to a service on Channel 46 already assigned to Rolla. The record contained uncontradicted evidence in communications from residents of both Rolla and Salem that the VHF services reaching the area were extremely poor. Not a single letter attested to existing service being satisfactory. Hence, there was nothing arbitrary or capricious in the Commission's conclusion that these poorly received VHF services "would pose no real competitive handicap to a local UHF operation."

5. The failure of anyone heretofore to apply for Channel 46 at Rolla-Salem does not prove that such a UHF station could not serve Salem-Rolla substantially as well as the station proposed by 220 Television Inc. on VHF Channel 2. An equally tenable inference is that no one, without 220 Television's ulterior motives for getting Channel 2 out of St. Louis, believes the communities large enough to now support a local station, whether UHF or VHF. The burden of showing that a UHF station would not be feasible was on 220 Television, Inc., yet it did not even consider this obvious alternative in its comments.

6. A channel 46 UHF station from Rolla would by itself not only cover Salem and Rolla but all of the "white" area population that would be served by a Channel 2 VHF station except for only 6,581 people in the peripheral area. It would also be consistent with UHF operations at Poplar Bluff and West Plains covering not only the 6,581 people in the peripheral area but an additional 23,380 people that could not be reached by a VHF service. The Commission, therefore, was not arbitrary or capricious in concluding that a channel 46 operation at Rolla with similar operations on Channel 20 at West

Plains and on Channel 15 at Poplar Bluff "would provide a greater area and population with a first Grade B signal than would the proposed Channel 2 operation of 220 Television."

Nor was the Commission arbitrary or capricious in considering the white area that would be served as UHF stations are installed at West Plains and Poplar Bluff. There is no basis for 220 Television, Inc.'s assumption that UHF use in this area will be static. Commission policy permits low cost and low budget UHF "satellites" for communities that cannot initially support local programming. Such a satellite has already been established at Poplar Bluff, and three UHF translators have recently been established at West Plains. Both satellites and translators can be expected in time to provide local programming. The enactment of all-channel receiver legislation on July 10, 1962 will be an additional factor encouraging the fuller use of UHF at West Plains and Poplar Bluff.

7. The deintermixture of Springfield was completely consistent with Section 307 (b) of the Communications Act. Sangamon Valley Television Corporation misconstrues the Commission's action as being designed for the benefit of private parties or as adopting "a doctrine of competitive equality." The question of competitive advantage or disadvantage begs the question. For, Sangamon Valley, if Channel 2 is assigned to Springfield, will itself obtain a competitive advantage over existing UHF operations. Sangamon confuses ends with means. It would make an equal allocation of each type of channel—UHF and VHF—an end in itself, regardless of its impact on the total number of services received by the community. If deleting a single potential VHF service will preserve and expand the total number of competitive services on UHF, the Commission was warranted in directing such deletion.

Nor is any question here involved of the disqualification of any Commissioner because of *ex parte* matters involved in the 1957 proceeding. The innuendos of bias on the part of three of the Commissioners on the ground they also served in 1957 are unwarranted. The decision to again deintermix Springfield was joined in by all the Commissioners considering the case, not merely by the three who were on the Commission in 1957.

ARGUMENT

I.

The Record As a Whole Amply Supported The Commission's Conclusions That It Had Not Been Shown That St. Louis Could Not In The Long Run Support Four Commercial Television Stations.

The record showed that eight communities besides St. Louis have four televisions stations,[1] six of which are of comparable or smaller size.[2] Three other communities, all smaller than St. Louis were shown to have outstanding construction permits or applications pending for a fourth commercial station.[3]

Of the nine cities with four commercial VHF stations, in each of which three stations were network and one station was independent, St. Louis had the most recently

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[1] The eight other communities are Chicago, San Francisco—Oakland, Washington, D. C., Minneapolis—St. Paul, Dallas—Ft. Worth, Indianapolis—Bloomington, Denver, Colorado, Phoenix—Mesa (R. 352, 394). This enumeration, of course, does not include Los Angeles, which has six commercial VHF stations, or New York—Newark, which has one educational and six commercial VHF stations (Broadcasting Yearbook 1963, pp. A-9, 10, 59, 60, 61).

[2] The six communities of comparable or smaller size are Washington, D. C., Minneapolis—St. Paul, Dallas—Ft. Worth, Indianapolis—Bloomington, Denver, Colorado and Phoenix—Mesa (R. 354, 394).

[3] The three are Portland, Oregon; Miami, Florida; Fresno, California (R. 354, 394).

established independent station, namely 220 Television Inc.'s KPLR-TV (R. 392). There was expert testimony by affidavit that "KPLR-TV is the newest of all these independents and thus has not had as much time to build up audience, revenue and acceptance. KPLR-TV has been on the air for only two and a half years while the average of the other eight is in excess of nine years. The fact that the other independents have remained on the air for such an extended period of time would indicate in itself that they are operating profitably or are confident of future success." (R. 392)

The record further showed that other independents which had been on the air longer than 220 Television Inc.'s KPLR-TV had acquired correspondingly larger shares of the audience in their respective communities (R. 415). Thus, while KPLR-TV, which had been on the air less than two years, had only built up to 5.5% of the evening audience (6 p.m. to Midnight), other independents operating for an average of over eight years had built their shares of the audience up to 8.4% in Minneapolis—St. Paul, 10.9% in Washington, D. C., 13% in Phoenix—Mesa and 14.1% in San Francisco—Oakland (R. 415).

There was, hence, ample evidence to show, as might have been assumed *a priori*, that a newly established independent station like KPLR could not expect to immediately have as large a share of the audience as it would have when better established.

With this record data before it on the relationship of length of operation and share of audience, and 220 Television Inc.'s own figures (discussed under II below) showing it had obtained 8% of the area's revenues as against only 5.5% of its night audience, the Commission was hardly arbitrary or capricious in concluding (R. 644, ¶50):

> "While 220 Television mentions only its operating losses herein, we observe that the share of revenue which a station is able to garner from the total revenues in a market is more indicative than its operating losses of its chances of success in a market. The financial data which 220 Television submitted for its first full year operation indicate that its share was not small considering the time its independent station had been in operation and in competition for audience and business with established network affiliated stations."

The record further showed that over the past decade, the St. Louis area had a population increase of 23.5%, a retail sales increase of 55.1% (R. 358) and in the five years before 1961, an increase in television homes of 11.4% and in television revenues of 52.1% (R. 411).

With these figures on growth trends in St. Louis before it, the Commission again was hardly arbitrary or capricious in concluding that (R. 643, ¶49):

> "increased rather than less potential economic support may be expected for television stations in the area in the future."

After reviewing the foregoing portions of the evidence, and also having before it the record data as to the eight other communities having four VHF commercial stations,[4]

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[4] The evidence on the experience in other markets included the affidavit of James W. Blackburn which concluded: "The situation in markets like Portland, Oregon, Miami and Fresno, California, points up even more dramatically the future of independent stations. In all three of these cases, broadcasters are showing their faith by going ahead and building a fourth independent station in the face of three existing commercial stations. The construction is nearly complete on the ones in Portland and Fresno, while the one in Miami is awaiting a final decision. The fact that a number of broadcasters wanted to build an independent in Miami and had to go through an expensive comparative hearing, shows that such a facility is in demand, even in a market that is half the size of St. Louis. The final test, as stated above, is the price that a station will bring on the open market. If the present owner does not

the Commission summed up its views as follows (R. 644, ¶50):

> "In sum, all the evidence available to us warrants the conclusion that there is no merit whatsoever to 220 Television's claim that this market cannot support at least four commercial stations."

This conclusion, we submit, was clearly not arbitrary or capricious in the light of all the evidence in the record available to the Commission. The Commission, of course, "was under no obligation to recite every item of evidence, or of fact, which had some bearing on the question before it." *Sayger* v. *Federal Communications Commission* (Dec. 13, 1962) —— U.S. App. D.C.——, —— F. 2d ——, footnote 14.

II.

The Commission Did Not Rely on Secret Data Nor Was It Arbitrary In Considering Facts Other Than 220 Television, Inc.'s Losses.

220 Television, Inc. first argues that, by referring to 220 Television, Inc.'s share of the St. Louis revenues as "not small", the Commission was "illegally" using "secret data", and that hence its decision could not intelligently be reviewed either by 220 Television, Inc. or by this Court.

There are three short answers to this:

1) First, the total St. Louis revenues were not a secret, for the Commission annually publishes market totals. For 1960, the published St. Louis market revenue total was $12,433,587. 220 Television, Inc., of course, knew what it had reported, to wit, $938,399. It was hence a simple computation for 220 Television, Inc. to know that the

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believe it can be operated profitably and will place the station in our hands, we feel confident that we can obtain a sales price of at least $2,500,000." (R. 393)

share of the market to which the Commission referred was some 8%.

2) Second, it is irrelevant that the percentage of revenue received by each of the other three stations was not made public. The Commission did not purport to compare 220 Television's share with that of the three individual other stations. It referred merely to 220 Television's share of the *total* revenues.

3) Third, there was no violation of privilege in the Commission's use of these revenue figures. It was 220 Television Inc., not the Commission, which injected a portion of its profit and loss statement into the case, by relying on its losses in its publicly filed comments. (R. 321) A party obviously cannot rely on part of its profit and loss situation and then try to conceal the balance, on the ground that it had all been included in a report which normally would be privileged as a confidential communication. It is settled law that "Once the confidential matter is voluntarily disclosed to the public, it is no longer a secret and the privilege which might be claimed under the statute disappears." *In re Associated Gas & Electric Co.* (D.C. N.Y. 1944) 59 F. Supp. 743.

The situation is analogous to the holding that a party, who puts his income into issue, cannot claim that his tax returns, relating to that income, are privileged from examination.[5] Here, having put in issue the alleged impossibility of a fourth station operating at a profit "for the long term", by making public only its losses including those set out in its financial report for 1960, 220 Tele-

[5] In *Rubenstein* v. *Kleven* (U.S.D.C. Mass., 1957) 25 Fed. Rules Serv. 34.42, Case 1; 21 F.R.D. 183, the Court said "A party who chooses to litigate an issue upon which his tax returns may cast significant light cannot claim that these returns contain confidential information, at least in the absence of an assertion by the taxing authority that in protection of its paramount interest such confidence must be observed."

vision Inc. cannot claim that the revenues it also reported for that year are privileged from consideration.

220 Television also claims that the Commission was guilty of "an abrupt departure from settled practice" in considering factors other than losses. (Here, as shown above at pages 11-14, the other factors before the Commission were St. Louis growth trends, 220 Television's share of the revenues as well as the experience of eight other communities supporting four commercial VHF stations.) This is simply not so. In the 1957 proceeding, to which 220 Television Inc. refers, the Commission granted a temporary authorization on Channel 2 to Signal Hill, then operating on a UHF channel, not merely because of its losses, but because "indications are that the UHF station could not survive the advent of the third commercial VHF." (15 RR. 1525, 1535). In support of this conclusion, the record in the 1957 proceedings not only contained statements by Signal Hill, as to its own losses, *but also included references to Commission and Congressional findings with respect to the experience of UHF stations in other markets containing two or more operating VHF stations.*[6]

Similarly, in the other cases to which 220 Television, Inc. refers, in which losses were taken as an index of the

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[6] Comments of Signal Hill November 30, 1956 (U.S. Ct. of Appeals D.C. Case No. 13, 992 Joint Appendix, p. 37-A) "In this connection, the experience of KTVI bears out the Commission's *findings with respect to operation of UHF stations in markets containing two or more operating stations.*" (Emphasis supplied). The Comments further pointed out (ibid., p. 39A footnote 1), quoting from a Senate Report: "In general UHF stations have been successful in those areas in which they had no VHF competition . . . But in those markets where UHF stations have faced competition from *two or more VHF stations*, the *uniform* result has been continued financial loss that has either driven the UHF station off the air or is likely soon to do so if this trend cannot be reversed." (Emphasis supplied)

ability of a community to support a particular station, there were other facts, in addition to the losses, relied on by the Commission for its decision.

Thus in the *Fresno Deintermixture Case*, 15 Pike & Fischer, RR 1586i, 1593, the Commission, after reciting the losses sustained by the UHF station, went on to rely on experience elsewhere: "Our experience in other markets has demonstrated that the establishment of a VHF station in a UHF market such as Fresno generally seriously affects the ability of the UHF stations to continue to render service to the public, etc." In *Tri Cities Broadcasting Co.*, 23 Pike & Fischer RR 1045, a change of site was approved to enable a television station to serve a larger area which it claimed necessary "in order to survive economically." Nothing in the opinion sustains the view that the mere fact of losses is *per se* proof of the inability of a market to sustain a station. In *Capital Cities Broadcasting Corp.*, 24 Pike & Fischer RR. 675, where a change in site was denied, there is merely the dictum at page 680 that "the Commission has recognized that economic necessity may require a station relocation in order to assure the continued survival of the station" adding that "However, nowhere in applicant's present proposal is there any allegation that the applicant is unable to survive at its present site . . ."

On the other hand, in the present proceeding, 220 Television Inc. relies solely on its alleged losses, and *has not a syllable to explain why it could not survive as an independent fourth station when independent fourth stations are operating in eight other communities, six of which are of comparable or smaller size than St. Louis.*[7]

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[7] See supra at pages 11-14.

In view of all the foregoing, the Commission was in no way arbitrary or capricious nor was it departing from "settled practice" in holding that the mere fact of a net loss in 1960, in light of all the other facts of record, was insufficient to show that St. Louis could not "in the long run" support four commercial stations.

Of course, the burden of proof on this issue was on 220 Television Inc. to show that St. Louis *could not* "in the long run" support four commercial stations. It was not incumbent on the Commission to show that the area *could* support such stations. In *Carroll Broadcasting Co.* v. *Federal Communications Commission*, 103 U.S. App. D. C. 346, 258 F.2d 440, where inability of a community to support a new station was held to be grounds for protest, this Court held the burden of proof on the protestant "is certainly a heavy burden." The Commission here was certainly not arbitrary or capricious in holding that 220 Television, Inc. had not met that "heavy burden."

III.

The Commission Did Not Make Any Improper Presumption In Favor of St. Louis By Reason of Its Recognition of the Actual Situation Prevailing in St. Louis and Springfield.

220 Television, Inc. claims (Br. p. 36) that the Commission "assigned a substantial presumption" in favor of St. Louis by reason of KTVI's existing operations on Channel 2 in St. Louis, and that this was error.

In the first place, we find nothing in the Commission's Report purporting to assign any special weight to the admitted fact that there was an actually existing service on Channel 2 in St. Louis. Hence, the real question is whether the Commission acted unlawfully in taking *any*

cognizance of the fact the St. Louis public was, and had been, receiving a concededly useful service on Channel 2 since 1957.

It will be recalled that, when this case was last before this Court, the Department of Justice, in arguing for a de novo proceeding, emphasized that in such proceeding the decision should be based on the changes that might have occurred since 1957. Its brief stated (p. 6):

> "since a new evaluation is admittedly now required, *we do not see how, either as a practical or legal matter, the Commission could close its eyes to the actual situation as it presently exists.*
>
> "The ultimate question here, as the Commission has so strongly urged, is the rule making determination as to where, for the future, Channel 2 shall be allocated to provide a most equitable allocation of frequencies . . . But how can this prospective determination be made on a stale record? Thus, let us assume the majority of the present members of the Commission were to conclude that applying the 1956 standards to the 1957 record Springfield should not have been deintermixed. *Is there any doubt that it would be contrary to the public interest to move the VHF channel back without consideration of the changes that might have occurred since 1957?*"
>
> (emphasis supplied)

The Court apparently accepted this reasoning of the Department of Justice holding "it would not be appropriate for the Commission to determine in 1961 on the basis of a somewhat supplemented 1957 record where and to whom VHF channel 2 ought to be assigned." (111 U.S. App. D.C. 113, 294 F. 2d 742)

Community Broadcasting Co. v. *Federal Communications Commission*, 107 U.S. App. D. C. 95, 274 F.2d 753 is not in point. There, the Court was faced with a proposed temporary authorization to one of two competing applications. The Court cautioned against such authori-

zations as inimical to the *Ashbacker* rights of the other applicant since the fact of investment *by the temporary operator* might subconsciously weigh in the balance *in favor of such operator.*

Here, however, the Commission took cognizance, *not of the private investment* on the part of Signal Hill in KTVI, *but rather of the public interest* on the part of the St. Louis populace in the service it has been receiving on Channel 2 in the St. Louis area. There was, of course, nothing inherently "unlawful" in the service being received by the public.[8] Nor does anything in *Community Broadcasting* prohibit the Commission, in weighing *the public interest aspects* of this proceeding, to take cognizance of the factual impact of its decision, *not on KTVI, but on the public receiving its service.*

Unlike the situation in *Community Broadcasting, supra* there is here no presently proposed and prospective temporary operation. Rather, there are, as accomplished events, the conceded facts that, since 1957, UHF services have been established and are now being used by the public in central Illinois, and a VHF service has been established and is now being used by the public in the St. Louis area.

Under these circumstances, for the Commission to have made its decision, pretending that the new UHF services are not now being received by the central Illinois public or that the VHF service on Channel 2 is not now being received by the St. Louis public, would have been contrary to the actual facts and the mandate of this Court.

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[8] If this court had deemed the channel 2 service inherently unlawful, it would not in its July 27, 1961 decision have authorized that "in the discretion of the Commission, existing services may be maintained." *Sangamon Valley Television Corp.* v. *United States,* Ill U. S. App. D. C. 113, 294 F. 2d 742.

Furthermore, in its own Comments before the Commission, 220 Television, Inc. did not contend that the Commission could not take cognizance of the actual situation affecting the public interest in the St. Louis area.[9] 220 Television, Inc. did not dispute the benefits *to the St. Louis public* of having four VHF commercial stations, or that the *St. Louis public* was in fact receiving service on Channel 2. Its sole argument was economic: that, in terms of broadcast revenue, St. Louis could only support three commercial stations. But there was no dispute that, for programming richness and variety, the public interest had in fact been furthered by having four commercial channels in the St. Louis area.[10]

In view of the foregoing, there was no error in the Commission taking cognizance, not, be it emphasized, of the private interest of KTVI in its investments, but of the public interest of the St. Louis populace in the Channel 2 service it has been receiving as well as the public interest of the people in Central Illinois in the UHF services they have been receiving.

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[9] 220 Television, Inc. did not proceed as though Channel 2 had not been on the air since 1957. Indeed, its entire argument that St. Louis could not support four stations was based on the losses it had allegedly sustained in 1960 because of competition from three net work stations, one of which was KTVI on Channel 2 (R. 323-326). To be logically consistent, 220 Television, Inc. should not have appealed to its supposed alleged actual experience in the St. Louis market in 1960 but should have argued as to whether as of 1957 a market the size of St. Louis, with its growth trends, could hypothetically support four rather than only three commercial stations.

[10] The program service from the four VHF commercial stations was set forth in Signal Hill's December 4, 1961 comments at pages 21 to 34 and Exhibits 1-17. R. 184-197, 213-270. 220 Television, Inc. did not challenge any of these facts in its Reply Comments of January 8, 1962.

IV.

There was Ample Evidence in the Record as a Whole to Support the Commission's View that the Existing VHF Services to Salem-Rolla Were So Poor that they Would Be No Handicap to a Service on Channel 46 Already Assigned to Rolla.

The record showed that a station on Channel 46, already assigned to Rolla, would not only cover Rolla and Salem (R. 389) but would provide a first service to a substantial "white" area of 18,860 people. (R. 384).

220 Television, Inc. did not attempt to explain to the Commission why it would not be in the public interest for this channel to be utilized. It argues now (Br. p. 14) (though it made no such presentation before the Commission) that Channel 46 could not be used because "much of the Salem-Rolla area receives VHF service, a factor the Commission has consistently held to be controlling in determining that VHF rather than UHF assignments should be made."

But the record contained uncontradicted evidence, in the form of numerous communications from residents of both Rolla and Salem, that the VHF services reaching the area were extremely poor, and the Commission accordingly found (R. 645)

> "The letters received from residents of the area indicate that reception of VHF signals from other cities is not too satisfactory, and it would appear that they would pose no real competitive handicap to a local UHF operation."

220 Television, Inc. brushes these letters aside by claiming (Brief p. 34) they were inconsistent with the finding that an ARB Television Coverage Study of 1960 showed "a considerable amount of service available in this area."

But the Commission was not at all inconsistent. It merely recited the facts revealed by the ARB Study, that a large number of homes in Salem and Rolla were equipped for television and "receive" various stations from other cities. The test was not, however, whether VHF stations were "received" but whether the reception was *good enough* to be a handicap to a good UHF signal.

Here the record is unanswerable. Not a single letter attests to existing services being satisfactory, while dozens describe the existing reception as "poor", "very poor", "snowy jerky", "undependable", etc. For the convenience of the court, we quote below relevant excerpts from such letters.[11]

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[11] The record contained letters stating as follows from residents of Rolla:—"we are now only receiving fringe television benefits" (R. 508); "we are now only receiving fringe television benefits and we would like to have a local service giving high quality picture and sound" (R. 509); "we are only receiving fringe television benefits" (R. 511); "I have a particular interest in desiring this service because of the poor picture and sound in this area" (R. 513); "we are now receiving only fringe television benefits" (R. 514); "We have a particular interest in desiring this service because I would like a clear picture and good sound" (R. 520); "we would receive a better picture. The pictures that we now have are not very good." (R. 522); "we would appreciate the F.C.C. granting Channel 2 to this Rolla-Salem area so that we would have continuous clear picture and sound" (R. 527); "we are now only receiving fringe television benefits" (R. 529); "with Channel 2 located in the Rolla-Salem area we could have decent reception" (R. 530); "we would get a better picture" (R. 537); "we have undependable reception from all T.V. stations" (R. 543); "it would be a pleasure to have T.V. reception that did not blur, snow, and roll" (R. 545); "we are in the fringe areas of other stations and do not get good reception" (R. 549); "I would like to be able to watch one program completely through without it being interrupted by some other channel coming through, or by snow, poor sound, and a number of other things that often occur." (R. 551); "We have a particular interest in desiring this service because we would get better pictures" (R. 553); "we have poor television reception" (R. 559); "we deserve to have a decent T.V. picture and good sound" (R. 560); "the Rolla area gets poor T.V. reception" (R. 561); "we would like to have clear picture and sound rather than snowy jerky pictures" (R. 565); "we are now

While these letters were obviously solicited by 220 Television, Inc.,[12] their unanimity leaves no doubt of the accuracy of the statements as to the poor quality of reception. Hence, they negate any inconsistency between the summary of what the ARB Study showed, as to the *number* of television sets and *number* of VHF stations giving service, and the Commission's conclusions to the *quality* of that service. Thus, while the ARB Study showed about half of the houses in Salem able to receive various stations, the Salem Chamber of Commerce explained such service was *never dependable.* Its comments stated (R. 601)

> "We lie in the fringe area between Springfield, Missouri and St. Louis, Missouri and as a result we *never have dependable television service.* This is not to mean that we do not have good picture and sound, but it is *rather a rarity than the rule.*" (Emphasis supplied)

The comments, quoted in footnote 11, supra, describe the same condition as prevailing in Rolla.

Certainly, on this record, there was nothing "arbitrary" or "capricious" in the Commission's conclusion that the reception from VHF stations was so poor that these stations "would pose no real competitive handicap to a local UHF operation."

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receiving nothing but fringe area television" (R. 566); "we are in the outer fringe of the other stations and receive a very poor picture" (R. 579); "we now receive only fringe television reception" (R. 582); "the Rolla-Salem area people deserve better reception on their T.V. sets" (R. 586); "would like to see what it would be like to get clear sound and pictures on T. V." (R. 589); "there are numerous T. V. sets in the Rolla-Salem area that get poor T. V. reception" (R. 590); "We need better picture, better sound" (R. 591); "we do not use T.V. coverage because of unreliability of reception" (R. 599).

[12] The record contains no extrinsic evidence of the genesis of these letters. However, their similarity in form carries the intrinsic earmarks of organized letter writing campaigns by 220 Television Inc.

V.

The Failure of Any One to Apply for a Station on Channel 46 at Rolla Whereas 220 Television, Inc. Makes a Commitment to Construct such a Station on Channel 2 Does Not Demonstrate that a VHF Station at Rolla Is Economically Feasible and a UHF Station Economically not Feasible. An Equally Tenable Explanation is That No One Without Ulterior Motives In Getting Channel 2 out of St. Louis Believes the Community Is Ready for a local Station, Whether UHF or VHF.

As 220 Television, Inc. notes in its brief, the idea of assigning Channel 2 to the area of Salem originated in the 1957 proceeding. In that proceeding, the Terre Haute station owner, Wabash Valley Television Corporation, operating a station on the only channel then assigned to the city, proposed that Channel 2 be assigned to a site near Salem inconsistent with the assignment of Channel 2 to Terre Haute. Thus, had its proposal been adopted, Wabash Valley Television Corporation would have avoided competition from a second station in Terre Haute.

220 Television, Inc.'s 1961 proposal if granted would have a similar ulterior benefit for it. Putting Channel 2 in the Salem area precludes its use in St. Louis. This would put Signal Hill off the air and promote 220 Television's Channel 11 operation on KPLR in St. Louis from being one of four stations to being one of only three stations. It is, hence, not unreasonable to infer that, because of these benefits to its St. Louis interests, 220 Television, Inc. might well be willing to promise to operate an economically questionable local station at Salem-Rolla.

Under these circumstances, the fact that no one has applied on Channel 46 while 220 Television, Inc. makes a "commitment" to build on Channel 2, does not demonstrate that Salem-Rolla could support a VHF station but

not a UHF station. An equally tenable explanation is that Salem-Rolla is not yet ready for a local television station, either on UHF or VHF.

From this viewpoint, the Commission was not obliged to accept the 220 Television, Inc. "commitment" as a demonstration that a station on Channel 2 would be practicable and would in fact be constructed and operated. Such a commitment, in its nature, is not irrevocable. Hence, if, after Channel 2 were deleted from St. Louis, 220 Television established, on further investigation, that a local station at Salem-Rolla was after all not feasible, the Commission would have no power to compel it to continue, or even begin, such station. The normal inference that a commitment to build a station is presumptive evidence that such a station is economically feasible and will in fact be built and continue in operation, becomes questionable in this case because of 220 Television, Inc.'s ulterior interest in the deletion of Channel 2 from St. Louis.

Nor is there validity to 220 Television, Inc.'s claim (Br. 30, fn 27) that on this issue the Commission "ignored" the letters from local residents. For the language of these letters (R. 482 et seq.) did not demonstrate community ability to support a station but simply the normal desire of any locality for a more dependable signal and local programming. Failure of the Commission to advert to the letters was no index that they were "ignored", since the Commission was under "no obligation to recite every item of evidence, or of fact, which had some bearing on the question before it." *Sayger* v. *Federal Communications Commission*, supra p. 14.

Furthermore, the 220 Television, Inc. "commitment" could not blind the Commission to the long-term disadvantages to the West Plains-Poplar Bluff areas of prematurely placing a VHF station at Salem-Rolla even if the 220 Television Inc. "commitment" were to be taken at face value. For, as the Commission pointed

out (¶ 57, R. 646), "the assignment of Channel 2 to this area would virtually insure the establishment of a one station monopoly in a wide area which must look to UHF for local outlets and services." A channel 46 operation, on the other hand, would not only completely cover Salem-Rolla but enable continued development of translators and satellites at Poplar Bluff and West Plains, which, could not only eventually provide local programming but in the meantime would give a first service to a large white area outside the contour of a channel 2 operation. These advantages of using UHF are discussed below in detail in Section VI of the Argument.

VI.

A Channel 46 UHF Station From Rolla Would by Itself Not Only Cover All Salem and Rolla but All of the "White Area" That Would Be Served By a VHF Station at Salem-Rolla Except for Only 6,381 People Living In A Peripheral Zone. It Would also Be Consistent With UHF Services At Poplar Bluff and West Plains Which Would Cover Not Only the 6,581 People in the Peripheral Zone But an Additional 23,380 People Who Cannot Be Reached By VHF Service.

220 Television, Inc. is inaccurate, to say the least, in asserting (Br. pp. 10, 16, 30) that the record showed that the proposed Channel 2 operation would serve a "white area" of "between 60,000 and 80,000 persons," or "at least 60,000" persons.

Its initial December 4, 1961 comments claimed a "white area" population of 100,080 (R. 333). This was palpably wrong because of 220 Television, Inc.'s failure to include service from KRCG in Jefferson City, Missouri. Signal Hill, pointing out this error in its Reply Comments, stated (R. 361):

> "This serious error in its comments makes 220 Television Inc.'s proposal unconvincing, if it does not

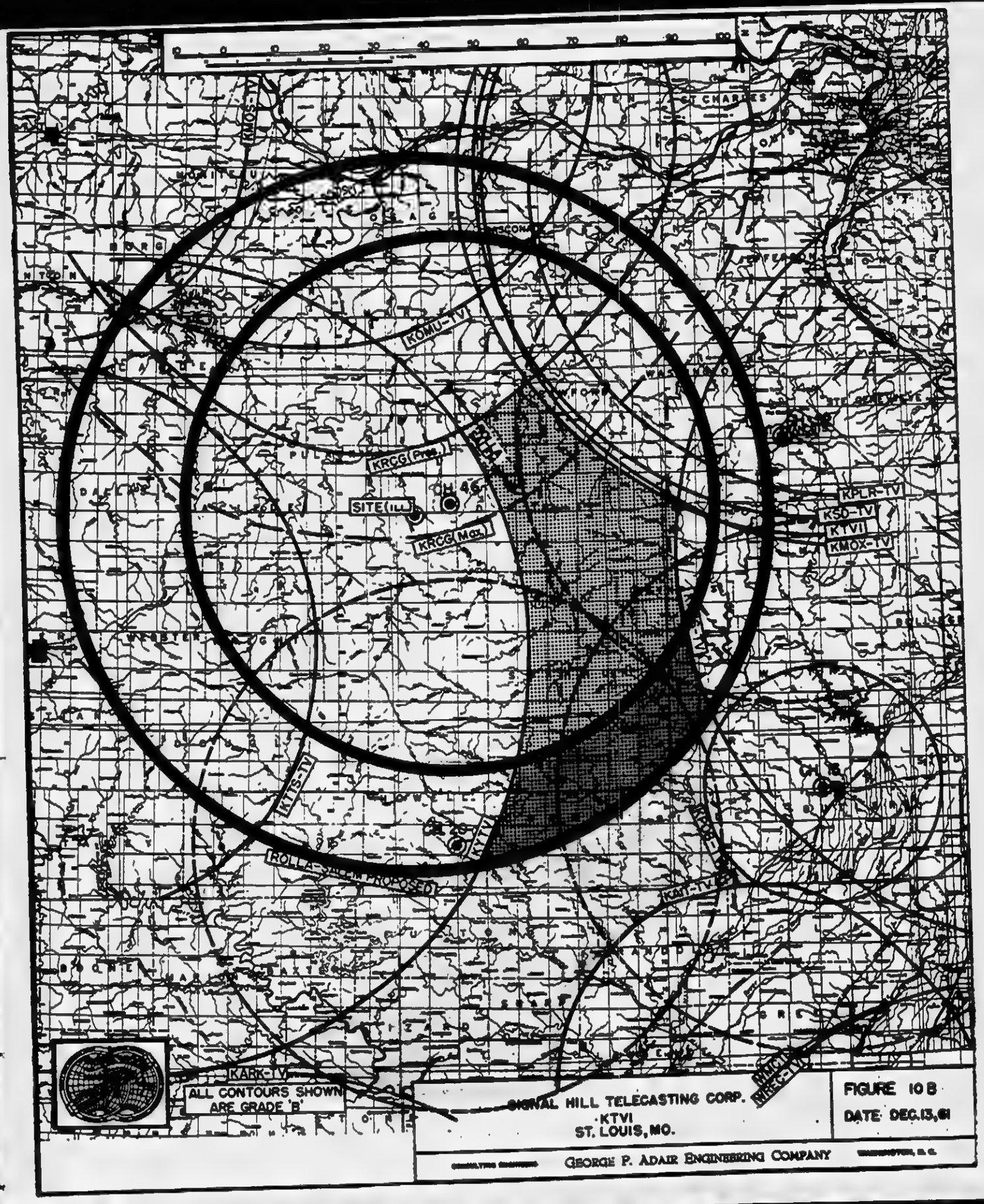
> vitiate the proposal completely. It also poses the question whether its real purpose is to merely get Channel 2 out of St. Louis rather than to serve an actually investigated and ascertained need in the Rolla-Salem area."

No step was taken to correct this error until the filing of 220 Television Inc.'s Reply Comments of January 8, 1962 in which the error was belatedly admitted (Reply Comments, footnote 2, R. 422). New figures were given but these were not "at least 60,000" or "between 60,000 and 80,000", as stated in 220 Television's Brief (pp. 10, 16, 30), but, as the Commission pointed out (¶54, R. 645), ranged between only 39,440 and 84,370 (R. 433) depending on which of three different engineering assumptions were made.

Signal Hill's figures, on the other hand, as the Commission recited (¶54, R. 645), showed a "white area" figure of only 25,441 people (R. 376-382). Signal Hill's figures also showed that a station on UHF Channel 46 at Rolla would give "white area" service to 18,860 people (R. 384) which is shy of the 25,441 people receiving a first service from a VHF Channel 2 operation at Salem-Rolla by only 6,581 people, located in a peripheral area.

The record also showed that this peripheral segment of white area, containing the 6,581 people and which is located between the Channel 2 Salem-Rolla contour and the Channel 46 Rolla contour, is close to and almost between West Plains, Missouri on the southwest and Poplar Bluff on the southeast.

To show this area, we set forth on the following page a reproduction of Signal Hill's Engineering Figure 10B (R. 389). To aid the Court in reading the map, we have colored the Channel 2 contour line in blue, the Channel 46 contour in red, the peripheral white area in orange, the contours of UHF operations from West Plains and Poplar Bluff in yellow, and the white area covered by them in


KOMU-TV
KRCG (Prop.)
SITE (ILL.)
CH 46
KRCG (Max.)
KPLR-TV
KSD-TV
KTVI
KMOX-TV
KTTS-TV
ROLLA-SALEM PROPOSED
KAIT-TV
KARK-TV
ALL CONTOURS SHOWN ARE GRADE 'B'
SIGNAL HILL TELECASTING CORP.
KTVI
ST. LOUIS, MO.
FIGURE 10 B
DATE DEC. 13, 61
GEORGE P. ADAIR ENGINEERING COMPANY

green. The peripheral area, of 6,581 people, it will be observed, is squarely within the coverage contours of UHF operations from Channel 20 at West Plains and Channel 15 at Poplar Bluff. But, in addition to reaching the 6,581 people in the peripheral area (in orange on Figure 10B) not reached by Channel 46 at Rolla, such additional UHF operations from West Plains and Poplar Bluff would give a first service shown in green to an additional 23,380 people who would not be reached by a Channel 2 operation from Salem-Rolla. Thus, a UHF operation at Rolla alone would be short by only 6,581 people of giving as much white area service as a VHF station at Salem-Rolla, and, with stations at West Plains and Poplar Bluff, would reach a white area population of 23,380 people who could not be served from a station on Channel 2 at Salem-Rolla, in addition to reaching the 25,441 people in the Channel 2 white area, or a total of 48,021 white area population (Tables IV and V, R. 376-384).

We have described this engineering data in detail to demonstrate that the Commission was not arbitrary or capricious, but had substantial evidence before it for concluding that a Channel 46 operation at Rolla, with similar operations on Channel 20 at West Plains and on Channel 15 at Poplar Bluff, "would provide a greater area and population with a first Grade B signal than would the proposed Channel 2 operation of 220 Television" (¶ 56, R. 645).

220 Television, Inc.'s answer (Br. p. 33) is that, to assume full power UHF operations at Poplar Bluff and Rolla are economically feasible, "is specifically contradicted by the history of the only UHF operator in the area and by the Commission's own experience with the coverage and technical deficiencies of UHF."

But this contention ignores the policy underlying the authorizing of UHF "satellite" stations, which is to

> "consider applications for stations in the UHF band which do not propose to originate any local programs and where it appears that this type of operation would permit *the flexibility in operation and the necessary economy to make feasible a television station which otherwise may not be constructed.*" (Pub. Notice 9036, August 4, 1954, 10 Pike & Fischer RR 1199, emphasis supplied)

Indeed, "the history" of KPOB, the satellite at Poplar Bluff, on which 220 Television, Inc. relies (Br. p. 33), refutes rather than supports 220 Television, Inc.'s argument. For, although presently on low power, the station has been operating since only September, 1961 (¶ 56, R. 645) and there was no reason in the record for the Commission to assume that, like other stations, it would not increase its power as it becomes better established, or that in time, it would not provide local programming too.[13]

Similarly, West Plains in the past year has established three UHF translators (R. 645). 220 Television, Inc. says (Br. p. 33 fn 30) these are "irrelevant", because under the Rules regular stations may be assigned without regard to their effect upon existing translator stations. But this misses the point completely. Translators are, in fact, equivalent to low power satellites and are authorized only on the upper 14 UHF frequencies. (F.C.C. Rules Sec. 4.701 et seq.) The establishment of these translators is, therefore, a step helping to build UHF set circulation and to pave the way for a UHF satellite on Channel 20 at West Plains similar to the satellite already established

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[13] In its Annual Report for 1962, the Commission stated (p. 62) "Since 1954, local TV stations have been eligible to operate satellites which do not require local studios or locally originated programs. This has brought service to some small communities where the costs of studio and programming staffs make regular stations uneconomic. *Some satellites have built studios to provide local programming.*" (emphasis supplied)

at Poplar Bluff, which can in time provide local programming.[14]

Hence, there was nothing in the record requiring the Commission to take a static or negative view of UHF possibilities in this area. To the contrary, the record showed that, in central Illinois, since 1957, UHF station WICS had successfully established satellites at Champaign (WCHU) and Danville (WICD) and WTVP of Decatur serves Champaign through a translator (R. 46). No reason is apparent in the record for not anticipating similar developments in greater UHF service for Poplar Bluff and West Plains areas, particularly in view of the start already made in both these cities as set forth above.

Nothing in the all-channel receiver legislation of July 10, 1962 (Pub. Law 87-529; 76 Stat. 150) or the regulations issued thereunder (Docket 14,769, Nov. 21, 1962, 24 Pike & Fischer RR 1585) is inconsistent with these conclusions of the Commission. Rather, by requiring that, after April 30, 1964, all receivers must be capable of receiving UHF as well as VHF channels, the new law can only serve to reinforce and hasten the development of UHF in these areas.[15]

In short, we submit that the Commission acted within its discretion in its conclusions as to the potentialities of

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[14] In its Report and Order in Docket 12, 116 of August 1, 1961, relating to UHF translators, the Commission also pointed out that ". . . UHF translators may eventually develop into a regular low power local broadcast service." (20 Pike & Fischer R. R. 1536, at 1542)

[15] Federal Communications Commission, Annual Report, Fiscal Year 1962, p. 62: "The Commission expects all 1965 model TV receivers to comply with the all-channel requirements whether they are produced before or after April 30, 1964. Industry, itself, expects a significant increase in the manufacture of all-channel sets. In the first 6 months of calendar 1962, of nearly 3.3 million TV receivers produced, 8.35 percent were UHF equipped. This contrasts with UHF reception provided for in 5.28 per cent of the 2.8 million TV sets made during the same period the previous year."

UHF in these areas, and that there is no basis for the charge that it acted arbitrarily. The feasibility of UHF development in this area of Missouri seems precisely the sort of technical question "which is to be answered by the Commission which has the expertise essential to its determination." *Sunshine State Broadcasting Co., Inc. (WBRD)* v. *Federal Communications Commission* (Jan. 31, 1963) —— U.S. App. D.C. ——; —— F. 2d ——.

VII.

The Deintermixture of Springfield was Completely Consistent with Section 307(b) Of The Communications Act.

1. *The Commission Did Not Adopt A Doctrine of "Competitive Equality" As The Rationale Of Its Decision.*

Sangamon Valley misconstrues the Commission's action as being designed "for the benefit of certain private parties" (Br. p. 18), i.e., to assist existing UHF operators in the Springfield area by adopting "a doctrine of competitive equality," to the detriment of the public interest.

Obviously, the question of competitive advantage or disadvantage begs the question. For, it is abundantly clear that Sangamon Valley, if Channel 2 is assigned in Springfield, will itself obtain a competitive advantage and benefit over existing UHF operators. The question, rather, is what action will give the public of Springfield and adjacent areas the greatest number of competitive television services.

In essence, Sangamon really contends that VHF and UHF television are so unrelated that Section 307(b) requires a separate distribution of VHF and UHF channels, thus prohibiting the Commission from taking a VHF channel out of Springfield even though this will assure multiple UHF service.

This argument confuses ends with means. It would make an equal allocation of each type of channel an end

in itself, regardless of the impact of such allocation on the total number of services received by a community. This would defeat, not promote, the purposes of Section 307(b).

Section 307(b), it must be stressed, does not speak of an equal and equitable distribution of *frequencies* but of *service*. And if, as the Commission found, deleting a single potential VHF service from Springfield, will preserve and expand the total number of competitive existing services on UHF, the Commission would be warranted in directing such deletion.

Since other parties are exhaustively briefing the question, we will not ourselves analyze the record to show that the Commission's conclusions were amply supported by the record. We approve and adopt the arguments in these briefs.[15]

2. ***No Question is Here Involved Of the Disqualification of Any Commissioner Because of the Ex Parte Matters Involved in The 1957 Proceedings.***

The briefs of both Sangamon Valley and the State of Illinois assert, by innuendo, that the decision below reflected bias on the part of three of the Commissioners on the ground they also served in 1957.[16]

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[15] The briefs we adopt are those of Plains Television Corporation which is licensee of UHF stations WICS, Springfield, WCHU, Champaign, Ill. and WICD, Danville, Illinois; WTVP Metropolitan Broadcasting Corporation which is licensee of WTVH, Peoria, Illinois; and American Broadcasting Company.

[16] Sangamon Valley at page 42 of its brief asserts "The Commission—*three of whose members had been subjected to the full gamut of Signal Hill's ex parte efforts* and who initially voted to give Channel 2 to that party in St. Louis—failed to conduct the 'entirely new proceeding' which was required and apparently failed to consider the facts of record in simply again reaching the same conclusion." (emphasis supplied) Likewise, the State of Illinois, at page 7 of its brief, asserts "Of the six Commissioners who

But, neither in the prior appeal nor in the statement of questions presented in the present appeal does any party claim any Commissioner was disqualified from considering the de novo case. Indeed, in its decision of July 27, 1961, *supra*, this Court held:

> "as the United States recognizes, it is unnecessary for the Commission to reconsider the conclusion expressed in its Report and Recommendation of February 16, 1961, that *no Commissioner is disqualified* and no party is absolutely disqualified . . ."

It is also worthy of note that the recent decision of July 18, 1962, again deciding to deintermix Springfield, was unanimous, so that the innuendos of bias quoted above are completely gratuitous as well as beyond the scope of the agreed statement of Questions Presented.

CONCLUSION

The action of the Commission was in no way arbitrary or capricious, nor did it rely upon "unlawful grounds". Its decision should be affirmed.

Respectfully submitted,

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MARCH 19, 1963

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ultimately decided the remanded proceeding, *three had been objected to multiple ex parte pressures on behalf of Signal Hill.*" (emphasis supplied)

BRIEF FOR INTERVENORS, AMERICAN BROADCASTING-PARAMOUNT THEATRES, INC., PLAINS TELEVISION CORPORATION, AND METROMEDIA, INC.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,356

220 TELEVISION, INC.,

Petitioner,

v.

UNITED STATES OF AMERICA,
and the
FEDERAL COMMUNICATIONS COMMISSION,

Respondents,

AMERICAN BROADCASTING-PARAMOUNT THEATRES, INC.,
SIGNAL HILL TELECASTING CORPORATION,

Intervenors.

No. 17,380

SANGAMON VALLEY TELEVISION CORPORATION,

Petitioner,

v.

UNITED STATES OF AMERICA
and the
FEDERAL COMMUNICATIONS COMMISSION,

Respondents,

SIGNAL HILL TELECASTING CORPORATION,
ILLIANA TELECASTING CORPORATION,
AMERICAN BROADCASTING-PARAMOUNT THEATRES, INC.,
PLAINS TELEVISION CORPORATION,
METROMEDIA, INC.,
220 TELEVISION, INC.,
and
STATE OF ILLINOIS,

Intervenors.

On Petition for Review of a Report and Order of the Federal Communications Commission

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Corporation and Metromedia, Inc.

March 19, 1963

QUESTIONS PRESENTED

The issues presented by the petitions for review in Case Nos. 17,356 and 17,380, as agreed to by the parties in the prehearing stipulation accepted by this Court, are correctly set forth in the briefs of the respective petitioners.

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STATUTES AND REGULATIONS

MISCELLANEOUS

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* Cases and authorities chiefly relied upon are marked by asterisks.

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On Petition for Review of a Report and Order of the
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BRIEF FOR INTERVENORS, AMERICAN BROADCASTING-PARAMOUNT THEATRES, INC., PLAINS TELEVISION CORPORATION, AND METROMEDIA, INC.

COUNTERSTATEMENT OF THE CASE

Since pertinent background matters are omitted from the statements of the case submitted by Sangamon Valley Television Corporation ("Sangamon") and to a lesser degree from the statement by 220 Television, Inc. ("220"), intervenors American Broadcasting-Paramount Theatres, Inc. ("ABC"), Plains Television Corporation ("Plains" or "WICS"), and Metromedia, Inc. ("Metromedia") proffer the following counterstatement:

The instant petitions for review stem from the Commission's Report and Order of July 20, 1962 (23 RR 1579, R. 628-650) which deintermixed Springfield, Ill., St. Louis, Mo., and Terre Haute, Ind., by removing VHF Channel 2 from Springfield (a predominantly UHF area) and by reassigning Channel 2 to both Terre Haute and St. Louis (predominantly VHF areas where UHF allocations made in 1952 have not been providing a "radio service"). The July 20, 1962 Report and Order has its antecedents which explain and (we believe) justify the actions here challenged.

Throughout the proceeding (1948-1952) which culminated in the Commission's Sixth Report of April 14, 1952, the establishment of a a nationwide competitive television system was a paramount Commission objective.[1] In that Report, released April 14, 1952, the Commission reiterated its views, still currently sound,[2] that the 12 VHF

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[1] "If we cannot devise plans for 'a truly nation-wide, competitive system' of television for the next generation, we are not worth our salt." Chairman Coy, Address before Institute of Radio Engineers, FCC Mimeo. 19719, March 23, 1948. See Fourth Report of July 12, 1951, 1 RR Pt. III, pp. 91:556-558; see Sixth Report of April 14, 1952, 1 RR Pt. III, p. 91:664 (para. 197).

[2] "As the Commission has recognized from the outset, and has frequently reaffirmed, the 12 VHF channels alone are not adequate to make possible sufficient outlets for a fully competitive television system." Report and Order, released June 26, 1956 in Docket No. 11532 (13 RR 1571, para. 12).

channels then being utilized were insufficient to provide an adequate television structure (particularly in the more populous portions of the United States).[1] The Commission accordingly added 70 UHF channels (Channels 14 through 83) to the 12 VHF channels (Channels 2 through 13) theretofore set aside for television broadcast use.[2] The Commission also decided in its Sixth Report that the UHF and VHF channels should be "intermixed" and utilized in the same major markets (para. 200), on the premise that such an allocation system would compel the manufacture of nothing but all-channel receivers (para. 189), and that the new UHF channels would thus become in due course, with only 15 million VHF receivers then in use, "an integral part of a single, nation-wide television service" (para. 197).[3]

As a concomitant part of its Sixth Report, the Commission promulgated a detailed allocation table (Rule 3.606, 1 RR 53:606) designed to provide an aliquot share of television assignments to each of the several states and communities (47 U.S.C. Sec. 307(b)). There it was concluded that St. Louis needed six commercial facilities, Springfield, two, and Terre Haute two -- a determination from which petitioners at that point sought no review. In line with its intermixture concept, three of the six commercial assignments to St. Louis were in the VHF band (Channels 4, 5 and 11) and three in the UHF band (Channels 30, 36, and 42). In like fashion one VHF and one UHF channel were allocated to Springfield (Channels 2 and 20), and one VHF and one UHF to Terre Haute (Channels 10 and 63) for commercial use.

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[1] See Sixth Report of April 14, 1952, 1 RR Pt. III, p. 91:664 (para. 197).

[2] See Sixth Report of April 14, 1952, 1 RR Pt. III, pp. 91:606-607 (para. 22).

[3] Sixth Report of April 14, 1952, 1 RR Pt. III, pp. 91:661-665. As we shall see, the intermixture feature of the Sixth Report was subsequently repudiated by the Commission in its Report and Order of June 26, 1956 in Docket No. 11532 (13 RR 1571), a fact nowhere mentioned in Sangamon's Brief.

Within two years after the issuance of the Sixth Report it became painfully apparent to large segments of the broadcast industry that the policy of intermixing VHF and UHF channels in the same market was not producing the competitive pattern which the Commission had originally intended. For example, within weeks after the second VHF station went on the air in St. Louis in 1954, two UHF stations in that large market folded. In the smaller Terre Haute market, where a VHF applicant succeeded in obtaining a prompt uncontested grant, there were no "takers" thereafter for the UHF channel. However, in Springfield, where three UHF applicants merged and obtained a grant on UHF Channel 20 (WICS), while Sangemon and another applicant were involved in a long drawn out comparative hearing for Channel 2, the UHF station in Springfield was providing a highly satisfactory television service. In short, in large markets on the advent of a second VHF operation and in small markets on the advent of a first VHF station, it soon became all too clear that the UHF stations were folding and that the UHF channel assignments in such markets were going "begging" -- being nothing more than "paper allocations" and not "radio service" contemplated by 47 U.S.C. Sec. 307(b).

After much vacillation by the Commission, numerous hearings by Congressional committees, and a series of Court proceedings which need not here be further detailed, the Commission finally released its Second Deintermixture Report of June 26, 1956 in Docket 11532 (13 RR 1571), where it concluded that intermixture was not producing an integrated system, that the existence of a VHF assignment in some markets was thwarting opportunities for more effective competition among a greater number of stations, and (in the words of this Court) "that the intermixture of UHF and VHF channels was, on a nationwide basis, a failure." Jacksonville Journal Co. v. Federal Communications Commission, 101 U.S. App. D.C. 12, 13, 246 F.2d 699, 700 (1957). Pending further study, as a long range solution, of the advisability of ultimately moving all television into the UHF band (thus eliminating the intermixture

problem), the Commission concluded, as an interim measure, that it would re-examine its 1952 allocations with a view to determining, on a case-to-case basis, whether the deletion of VHF channels in predominantly UHF areas would "improve the opportunities for effective competition among a greater number of stations." Although recognizing that a decision in each market must turn on its individual facts, the Commission laid down detailed ground rules (five criteria) for such determinations (13 RR 1571, 1582).[1]

Concurrently with the release on June 26, 1956 of its Second Deintermixture Report, the Commission instituted some 13 rule-making proceedings to deintermix areas in which it appeared that the deletion or shift of a VHF allocation would "improve the opportunities for effective competition among a greater number of stations." Among the proceedings thus instituted was one (Docket 11747) to deintermix Springfield by removing VHF Channel 2 therefrom and substituting two UHF channels therefor (thus making that market all-UHF) and by assigning the deleted Channel 2 to St. Louis (thus adding a needed fourth commercial channel in a market obviously destined to become all-VHF).

On the basis of voluminous comments thereafter filed in that proceeding (Docket 11747), the Commission in a Report and Order released March 1, 1957 found, in line with Criteria 1 and 2, that substantially all of Illinois receives some television service; that Springfield is partly ringed at a distance of 35 to 58 miles by four UHF

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[1] "1. Whether significant numbers of people would lack service as a result of the elimination of the VHF channel.

"2. Whether one or more UHF stations are operating in the area.

"3. Whether a reasonably high proportion of the sets in use can receive UHF signals.

"4. Whether the terrain is reasonably favorable for UHF coverage.

"5. Whether, taking into account all the local circumstances, the eliminating of a VHF channel would be consistent with the objective of improving the opportunities for effective competition among a greater number of stations."

stations and at a distance of 78 miles or more by VHF operations; that since Channel 2 was not on the air in Springfield, no one would lose an existing service by its deletion; and that there was little or no area which would receive a service from Channel 2 in Springfield which did not already receive a usable signal from other existing stations (22 FCC Reports 318, para. 11).

Furthermore, as the Commission noted, with the elimination of Channel 2 as a lethal threat to UHF operations in central Illinois, there was every reason to expect that any so-called "white area" would be covered in one of two ways -- by the UHF stations increasing their antenna heights and power once the danger of being swallowed up by VHF operations was past, and by other persons making use of available UHF allocations in that area, knowing that they were not going to be smothered by a second wide-coverage VHF facility (22 FCC 318, paras. 11 and 22).[1]

Under Criterion 3 the Commission found, as one might expect with only one Grade B VHF signal in the Springfield-Decatur area, that 85% to 100% of the sets in the nine counties in and around Springfield were capable of receiving UHF signals. Thus Springfield clearly was a UHF area (22 FCC 318, para. 9). Under Criterion 4, the Commission

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[1] How right the Commission was on this score is amply demonstrated by the UHF growth which has taken place in Central Illinois since the release of the Reports of June 26, 1956 (repudiating intermixture) and of March 1, 1957 (de-intermixing Springfield and Peoria): WICS in Springfield has erected a taller tower and increased its power 20-fold. It has established a UHF satellite station in Champaign, thus providing a second competing service in that market. A third UHF station has gone on the air in Peoria; another UHF operation in Peoria has established a UHF satellite in LaSalle; and the other two UHF stations in Peoria have each set up UHF translators to serve LaSalle. The Decatur UHF station, now licensed to Metromedia, has not only retained its network affiliation (ABC) and continued to serve the Decatur-Springfield area, but has installed a UHF translator in Champaign-Urbana. The fact that Springfield itself does not yet have a second UHF station of its own is in large part attributable to the uncertainty caused by the present litigation over whether VHF Channel 2 is or is not to be activated in that market. Notwithstanding this uncertainty two applications for UHF Channel 26 in Springfield are presently pending before the Commission.

found that the flat terrain of central Illinois, with no foliage problems, was ideally suited to UHF propagation (22 FCC 318, para. 10).

Under Criterion 5 it was likewise apparent from the data submitted, and the Commission so found, that the deletion of Channel 2 from Springfield would "enhance the opportunities for effective competition among a greater number of stations" (22 FCC 318, para. 24). The Commission knew from Docket No. 11532 and from experience in other markets that the activation of Channel 2 in Springfield would jeopardize if not destroy the existing operation of WICS on Channel 20 (22 FCC 318, para. 24). It knew that there were at least three groups desirous of providing a television service to Springfield. It knew that the market was sufficiently large to support at least two stations operating on a like footing (22 FCC 318, para. 24). The Commission likewise knew, if Channel 2 were taken out of Springfield and reassigned to Terre Haute and St. Louis, it would provide a badly needed second competitive television service in Terre Haute and a fourth competitive, commercial television service in St. Louis, a large metropolitan area to which six channels had been originally assigned (22 FCC 318).

The Commission accordingly concluded in its March 1, 1957 Report in Docket 11747 that the public interest would be served (1) by deleting Channel 2 from Springfield and by allocating two additional UHF channels thereto (thus making that market all-UHF); and (2) by reassigning Channel 2 to both Terre Haute and St. Louis so as to provide additional competitive services in those predominantly VHF markets (22 FCC 318).

From the March 1, 1957, Report and Order (22 FCC 318), the defeated applicant in the comparative hearing for Channel 2 in Springfield (Sangamon Valley Television Corporation) petitioned this Court for review, contending that the removal of the VHF channel from Springfield contravened Section 307(b) of the Communications Act (47 U.S.C. Sec. 307(b)), and more particularly the Supreme Court's

decisions in Federal Radio Comm'n v. Nelson Bros. Bond & Mortgage Co., 289 U.S. 266 (1933) and Federal Communications Commission v. Allentown Broadcasting Corp., 349 U.S. 358 (1955). This Court affirmed per curiam. Sangamon Valley Television Corp. v. United States, 103 U.S. App. D.C. 113, 255 F.2d 191 (May 1, 1958).

Sangamon thereupon sought certiorari, again contending that proper effect had not been given the requirements of Section 307(b). Although the Supreme Court subsequently granted certiorari, vacated this Court's decision, and remanded the case to this Court, its order pointedly made clear that such action was predicated, not on the legal question which Sangamon had raised in its petition for certiorari, but on matters which the Solicitor General had brought to the Court's attention in his brief in opposition, namely, subsequently disclosed testimony before a House legislative committee indicating that the March 1, 1957, Report and Order may have been tainted by ex parte approaches of one or more participants therein. Sangamon Valley Television Corp. v. United States, 358 U.S. 49(1958).

Following remand to this Court and thereafter to the Commission, it was ultimately determined to start "afresh," by a new notice of proposed rule making, released September 7, 1961, looking toward the deletion of Channel 2 from Springfield, and its reassignment to Terre Haute and St. Louis (Docket No. 14267).

After carefully studying the comments subsequently filed in that proceeding, the Commission by Report and Order released July 20, 1962 (23 RR 1579, R. 628-650) again concluded, as it had in 1957, that the existing pattern of television service in the Springfield-Decatur-Peoria area is "predominantly UHF" (para. 19), that the nearest VHF stations are 78 and 86 miles away (para. 20), that the Springfield area is well suited terrain-wise for propagation and reception of UHF television signals (para. 18), that "UHF can, and is providing, a satisfactory broadcast service" in the Springfield area (para. 18), that the utilization

of Channel 2 in Springfield (providing a second VHF service to that market) would "preclude the possibilities for a fuller development of diversified television service in this area in the near future and cause a serious deterioration in existing UHF service" in central Illinois (Springfield-Decatur-Peoria) (para. 29), and that the failure to activate Channel 2 in Springfield will not deprive anyone of an existing service, nor in fact result in any area lacking a "satisfactory television signal," as evidenced by existing television set saturation figures for counties which Sangamon classified as potential "white area" if Channel 2 were not utilized in Springfield (paras. 31-33).

The Commission further found that an immediate and important by-product of not using Channel 2 in Springfield would be its reassignment to Terre Haute and St. Louis, where it would provide a second competitive local service to Terre Haute and a fourth competitive facility in the large St. Louis market (paras. 40-51). Finally, in rejecting the counterproposal of 220 Television, Inc. to allocate Channel 2 to Terre Haute and Salem-Rolla, Mo., rather than to Terre Haute and St. Louis, the Commission concluded, on the basis of the data submitted, that the need of the large St. Louis metropolitan market for a fourth local commercial service and the risk of establishing a one-station VHF monopoly in Salem-Rolla, an area which must of necessity look to UHF for multiple local outlets and services, were such that Channel 2 should continue to be used in St. Louis rather than shifted to Salem-Rolla (para. 37).

The Commission accordingly concluded by its Report and Order of July 20, 1962 that Channel 2 should be deleted from Springfield (with two UHF channels substituted therefor), and that it should be assigned to both Terre Haute and St. Louis (23 RR 1579, 1598, para. 67).

By the instant petitions for review, originally filed in other Circuits and thereafter transferred to this Court, Sangamon challenges that portion of the Report and Order deleting Channel 2 from Springfield

and reassigning it elsewhere (Case No. 17,380), while 220 challenges that portion of the Report and Order assigning Channel 2 to St. Louis rather than to Salem-Rolla (Case No. 17,356). Intervenor ABC, as a nationwide television network interested in multiple competitive facilities in as many markets as possible, has intervened in both cases in support of the Commission's conclusions. Intervenors Metromedia and Plains, as licensees of UHF stations in Decatur and Springfield, respectively, have intervened in support of the Commission's conclusion not to utilize Channel 2 at this time in an area which is already predominantly UHF.

STATUTE INVOLVED

Section 303(g) and Section 307(b) of the Communications Act of 1934, as amended (47 U.S.C. Sec. 303(g) and 307(b)) provide:

> Sec. 303. Except as otherwise provided in this Act, the Commission from time to time, as public convenience, interest, or necessity requires shall--
>
> . . . . . .
>
> (g) Study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest; . . . .
>
> Sec. 307. . . . .
>
> (b) In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.

SUMMARY OF ARGUMENT

I

It cannot be gainsaid that the 12 VHF channels are inadequate by themselves to provide a nationwide competitive television service (13 RR 1571, para. 12). Any prospective benefits from the recent all-channel

receiver legislation are some years off. It is unthinkable that the 70 UHF channels should in the meantime be allowed to go to waste.

By June of 1956 it had become apparent to the Commission that its 1952 policy of intermixing VHF and UHF channels in the same markets was resulting in less service rather than more service (13 RR 1571). Large markets which could support three or more television operations but which (because of the limited number of VHF channels) had received only two VHF assignments in 1952 were being restricted to two stations (both on VHF), with the UHF assignments going begging in those markets. Likewise, in smaller markets where the Commission originally allocated one VHF and one or more UHF channels, the UHF stations were folding when the VHF station went on the air.

The Commission accordingly concluded in its Report and Order of June 26, 1956 in Docket 11532 "to improve the opportunities for more effective competition among a greater number of stations" (13 RR 1571) by utilizing UHF channels in areas where UHF stations were providing a satisfactory service, and by shifting the lone VHF channel from such areas to markets in need of more service and where UHF had been unable to gain a foothold. In this way the Commission hoped to make some use of the UHF frequencies pending further study of the feasibility of ultimately shifting all television to the UHF portion of the spectrum. To that end the Commission instituted rule-making proceedings in 13 areas (including Springfield-St. Louis) where it appeared that a shift of a VHF assignment from a UHF area to a VHF area (and the substitution of UHF channels therefor) would result in more television service in both areas (Docket No. 11747).

By Report and Order released March 1, 1957 (22 FCC 318), the Commission concluded that action shifting Channel 2 from Springfield and reassigning it to St. Louis and Terre Haute would not only result in more television service in those markets but would improve the

opportunities for more effective competition among a greater number of UHF stations in central Illinois, a conclusion amply borne out by developments during the past six years (a 20-fold power increase by WICS in Springfield, the establishment of a third UHF station in Peoria, the establishment of a UHF satellite and two translators in LaSalle, the establishment of a UHF satellite and translator in Champaign-Urbana, and the continuance on the air of UHF stations in Danville and Decatur).

It is little wonder, therefore, that the Commission by the Report and Order of July 20, 1962 (23 RR 1579, R. 628-650), here challenged by Sangamon, chose to retain the demonstrated public interest benefits of its earlier action.

II

Notwithstanding Sangamon's urgings to the contrary, the 1957 and 1962 actions of the Commission implemented rather than contravened the requirements of the Communications Act, including Section 307(b). Section 303(g) of the Act places upon the Commission the responsibility of encouraging "the larger and more effective use of radio in the public interest." Sangamon Valley Television Corporation v. United States, 103 U.S. App. D.C. 113, 255 F.2d 191, reversed on other grounds 358 U.S. 49 (1958). An intermixed system of channel allocations where the net effect of a VHF allocation is to close down one or more existing UHF stations does not constitute an "efficient and equitable distribution of radio service" within the meaning of Section 307(b). UHF "paper allocations" do not constitute "radio service."

The Commission's authority, by prior rule-making proceedings, to set aside one class of frequencies for "communities" of one type and a different class of frequencies for "communities" of another type, despite Section 307(b) objections interposed thereto, was sustained by this Court in Huntington Broadcasting Co. v. Federal Communications Commission, 89 U.S. App. D.C. 222, 192 F.2d 33 (1951). Thus, the

Commission properly decided in the Report and Order here challenged to make greater use of UHF channels in areas where UHF is providing satisfactory service, and to shift VHF channels from such areas to VHF markets where UHF cannot hope to provide a competitive service. 'It is for the Commission, not the courts, to pass on the wisdom of the channel allocation scheme." Coastal Bend Television Co. v. Federal Communications Commission, 98 U.S. App. D.C. 251, 234 F.2d 686 (1956). This is most certainly true where, as here, there is "a reasonable factual and legal basis" for the Commission's action.

III

With only 12 channels to work with, it is impossible to provide a transmission service on VHF for every village and hamlet in the United States (Priority 1). Salem-Rolla, with a combined population of fewer than 15,000 persons, must look to the future growth of UHF for a "mouthpiece" of its own. In the meantime the residents of Salem-Rolla and its environs are receiving television signal coverage (Priority 2) from other stations, as evidenced by television set saturation figures for the counties which Channel 2 operating out of Salem-Rolla would serve. To deprive some 3,000,000 people in the large St. Louis metropolitan area of a fourth independent (non-network) program service which they have enjoyed since 1959 in order that 15,000 persons would have a VHF outlet of their own would not encourage the "more effective use of radio in the public interest" nor result in an "efficient utilization" of scarce VHF frequencies. The choice between such demands for Channel 2 is one which "Congress, by employing the broad language of Section 303, wished to commit to the discretion of an expert agency, not the courts." Coastal Bend Television Co. v. Federal Communications Commission, 98 U.S. App. D.C. 251, 255, 234 F.2d 686 (1956).

ARGUMENT

The three above-named intervenors propose to take up first, under headings I and II below, the argument of Sangamon that the Commission's action removing Channel 2 from Springfield for use elsewhere contravenes Section 307(b) of the Communications Act. Intervenor ABC will then consider, under heading III, 220's contentions that Channel 2, whether it remains in Springfield or whether it is shifted to Terre Haute, should in any event be allocated to Salem-Rolla.

I

The Action Here Challenged by Sangamon Means More Rather Than Fewer Services to the Areas Involved

As the Commission itself has frequently recognized, the term "radio service" as used in Section 307(b) of the Communications Act comprehends both transmission and reception service, and both are important. In other words, the "radio service" which the Commission is under a duty to distribute efficiently and equitably embraces not only "coverage" but also "origination facilities." WSIX Broadcasting Station, 8 RR 216, 217-218 (1952); Newark Broadcasting Corp., 3 RR 839 (1947). In line therewith the Commission has recognized two basic priorities—a duty to provide at least one television signal to as much of the United States as possible (Priority 1), and a duty to provide to more substantial communities a "mouthpiece" of their own (Priority 2).

If the deletion of ungranted VHF Channel 2 from Springfield and its reassignment elsewhere meant that the people residing in and around Springfield would not have a television service of any kind, or that the state capital of Illinois would be left without a station of its own, intervenors would quite agree with Sangamon that such action would contravene the mandate embodied in Section 307(b) of the Act.

However, the deintermixture action here complained of, as made clear by facts of record in the instant proceeding, has resulted and will

result in more rather than fewer television services; not only in Terre Haute and St. Louis but also in central Illinois and in Springfield. Station WICS, licensed to intervenor Plains, has been providing a television service to Springfield and its environs on UHF since September 1953. As a result of the Commission's repudiation of its intermixture concept in its Second Deintermixture Report of June 26, 1956 (13 RR 1571) and the issuance of its subsequent Reports and Orders of March 1, 1957 deintermixing Springfield and Peoria (22 FCC 318, 342), intervenor WICS erected a taller tower and increased its power 20-fold. In April 1959 it established a UHF auxiliary operation (Station WCHU) in Champaign, Ill. by which many of the programs broadcast by WICS from the capital of Illinois are made available to the Champaign-Urbana area, thus providing some competition for VHF Channel 3 in that market. In 1960 it acquired a UHF station in Danville, Ill. A third UHF station (WMBD-TV), as a result of the Commission's 1956-1957 actions making central Illinois substantially all-UHF, was placed on the air in Peoria in January 1958. Another Peoria UHF station established a UHF satellite operation in LaSalle, Ill. (WEEQ-TV) in November 1957. UHF translators have been installed in LaSalle by each of the other Peoria stations. Station WTVP, now licensed to intervenor Metromedia, and an affiliate of ABC, has continued to serve the Decatur-Springfield area on UHF, and its programs are now available in Champaign-Urbana via a UHF translator. And with the affirmance by this Court of the actions here challenged, there is every reason to believe, in the light of what happened in Peoria and in view of the pendency of two applications for UHF Channel 26, that Springfield will in due course have a second station of its own on the UHF frequencies which have been substituted for Channel 2.[1]

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[1] With the uncertainty which has prevailed since 1957, on whether Channel 2 is or is not to be used in Springfield, it is not surprising that potential UHF operators have been slow to risk a half million dollars on a second UHF station in that market until such uncertainty is removed (cf. Sangamon Br., p. 43).

A further by-product of the Commission's 1957 and 1962 actions substituting UHF channels for VHF Channel 2 in Springfield and reassigning that channel to predominantly VHF markets will be an increase in the number of television services elsewhere. First, under a temporary authorization, and now by virtue of a short-term license following the actions here complained of, intervenor Signal Hill is providing a fourth commercial service to the St. Louis area on Channel 2 (as an ABC affiliate). Although UHF Channel 63 had been going begging in Terre Haute, after the only V in that market was activated in 1954, thus creating a monopoly situation, the allocation of another VHF channel to Terre Haute has already resulted in a rash of applications to provide a second competitive facility in that market. Cf. Fort Harrison Telecasting Corp. v. United States, Case No. 17,279.

Thus, by deintermixing Springfield and Peoria in 1957, actions which the Commission reaffirmed in 1962, an additional needed service has been (or will be) provided to both St. Louis and Terre Haute. But more importantly, existing UHF stations and services in central Illinois have survived and multiplied, notwithstanding the presence of one wide-coverage VHF signal in that general region (WCIA on Channel 3 in Champaign). If a second wide-coverage VHF facility were activated in central Illinois (on VHF Channel 2 in Springfield), WICS would lose its network affiliation (NBC) and hence the necessary programming, audience, and revenues with which to operate. This in turn would spell the end of its UHF satellite operation in Champaign and its marginal operation in Danville. Furthermore, past experience in comparable situations uniformly shows that a second wide-coverage VHF service in Springfield would jeopardize if not destroy the UHF operation in Decatur.

In short, by removing Channel 2 from Springfield and reassigning it to both Terre Haute and St. Louis, the following improvements in the number of competitive television services have already occurred or are

in the immediate offing — Terre Haute will have two stations rather than one (both VHF); St. Louis, a market originally deemed important enough to merit six commercial facilities, will have four instead of three such operations on VHF (one for each of the networks and one to provide an independent service); Springfield, instead of being limited to one facility (on VHF), will have at least two stations (on UHF); Decatur and Danville will continue to have stations of their own on UHF; Champaign will continue to enjoy a second competitive service; the three UHF Peoria stations and a UHF satellite in LaSalle will not be endangered by a second wide-coverage VHF operation in central Illinois.

II

The Action Here Challenged by Sangamon Implements Rather Than Contravenes Section 307(b) of the Communications Act

Despite these beneficent results from not utilizing Channel 2 in Springfield — of more rather than fewer television facilities in Terre Haute, in St. Louis, and in numerous cities in central Illinois — Sangamon argues that the Commission was foreclosed as a matter of law from taking the action which it did by reason of Section 307(b) of the Act (Sangamon Br., pp. 25-41). Petitioner would place a construction on that section which would preclude the Commission from deintermixing any market. Notwithstanding the admitted fact that the 12 VHF channels are not enough to provide a nationwide competitive system, and notwithstanding the fact that UHF channels become "paper allocations" in markets the size of Springfield, when a VHF station commences operating therein, petitioner says that a VHF channel must be assigned to Springfield by reason of Section 307(b), regardless of the public interest consequences and even though such action will mean fewer services rather than more services. We most emphatically disagree.

Section 303(g) of the Act places upon the Commission the responsibility of encouraging "the larger and more effective use of radio in the public interest." Section 307(b), in turn, places on the Commission the duty of so distributing licenses, frequencies, hours of operation, and power among the several states and communities as "to provide a fair, efficient and equitable distribution of radio service to each of the same." Unused UHF allocations which exist only on paper do not constitute "radio service."

As made clear by the legislative history of Section 307(b), summarized at some length by petitioner (Br. pp. 19-25), it was not the intention of Congress, particularly after the 1936 amendment, to place the Commission in a "strait-jacket." Experience had shown that Section 307(b) concepts could not be applied in mathematical fashion. Section 303(g), no less than Section 307(b), laid down criteria (and very important criteria) for determining whether a given action will serve the public interest, convenience and necessity. Those two sections of the Act must be read in pari materia. Individual sections of the Act should not receive a gloss which needlessly nullifies the ultimate standard laid down by Congress — "public interest, convenience, and necessity." See Logansport Broadcasting Corp. v. United States, 93 U.S. App. D.C. 342, 344-345, 210 F.2d 24 (1954).

Experience with the Commission's 1952 intermixture concept has shown that VHF and UHF do not coexist in the same areas. The 12 VHF channels alone are not enough to provide a nationwide competitive television system. In smaller markets to which a single V is allocated and in the larger markets where two V's are in operation, the 70 UHF frequencies have ceased to have any immediate utility under an intermixed system. But if a VHF is used in one market and UHF in another, those 70 UHF channels (which the Commission in 1952 found were needed to augment the 12 VHF) have some utility.

In other words, the more markets in which UHF can be utilized,

the more services which can be provided not only in those markets but also in other areas which are so predominantly VHF that UHF cannot hope to compete in the immediate future. Thus, we submit that a policy of deintermixture, instead of contravening Section 307(b) of the Act, in fact gives effect to the Congressional mandates embodied in Sections 303(g) and 307(b). An intermixed system which transforms UHF assignments into "paper allocations" does not encourage the "larger and more effective use of radio" (Section 303(g)). An intermixed system is not "efficient" nor does it result in a fair and equitable distribution of "radio service" when the net effect of the VHF allocation is to blot out one or more existing UHF operations (Section 307(b)).[1]

This Court has already so held when it affirmed on the merits similar action taken by the Commission in 1957, notwithstanding the selfsame Section 307(b) arguments which Sangamon there made. Sangamon Valley Television Corp. v. United States, 103 U.S. App. D.C. 113, 255 F.2d 191 (May 1, 1958). And in its order reversing and remanding, with all deference to Sangamon's intimations to the contrary (Br. 00. 4-5, 37), the Supreme Court made it abundantly clear that its action was not based on the grounds which Sangamon urged in its petition for certiorari, but because of intervening matters which the Solicitor General had brought to that Court's attention in his brief in opposition. Sangamon Valley Television Corp. v. United States, 358 U.S. 49 (1958).

Furthermore, as this Court held in Coastal Bend Television Co. v. Federal Communications Commission, 98 U.S. App. D.C. 251, 255,

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[1] A page of history is often worth a tome of theory. That no UHF channels were included in the 1945 table, that the intermixture policy had been "basic" to the 1952 Report, and that this intermixture concept was repudiated in 1956 (13 RR 1571) are matters which Sangamon conveniently chooses to ignore. Thus, the comfort which Sangamon professes to derive from the fact that a VHF channel and not a U was allocated to Springfield in 1945, and that both a V and a U were allocated to Springfield in 1952 (Sangamon Br. pp. 7-8, 10 fn. 1, 26, 27 fn. 1; cf. pp. 34-35) is largely misplaced.

234 F.2d 686 (1956), in sustaining the Commission's refusal on November 10, 1955 to set aside allocation concepts used in 1952: "... whether one factor [an additional service on VHF to a significant number of people] should outweigh the other [the destruction of an existing UHF operation] is precisely the sort of question which Congress, by employing the broad language of Section 303, wished to commit to the discretion of an expert agency, not the courts. It is for the Commission, not the courts, to pass on the wisdom of the channel allocation scheme ... So long as the Commission's action in such an area of discretion has a reasonable factual and legal basis, we may not overturn it."[1] Here the Commission has found as a fact, amply and fully supported by the record, that the deletion of Channel 2 from Springfield will result in more television service in that community, more service in St. Louis, and more service in Terre Haute. It has concluded that no significant number of people, if any, will be deprived of coverage which they might otherwise have expected if Channel 2 had remained in Springfield (R. 679-695).[2]

In fact, the result here reached by the Commission is fully sustained by the rationale of this Court in Huntington Broadcasting Co. v. Federal Communications Commission, 89 U.S. App. D.C. 222, 192 F.2d 33 (1951). There, as here, by prior rule-making action the Commission had adopted certain allocation concepts in implementation of Section 307(b). There the Commission, by rule, set aside certain AM

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[1] The Court thus made it clear in the Coastal Bend case (decided June 7, 1956) that it would not have substituted its judgment for that of the administrative agency even if the Commission had decided the question the other way. Thus the Commission was left free on June 26, 1956 (in Docket No. 11532) to repudiate, at long last, the unfortunate intermixture concepts utilized in 1952, and to take action on June 26, 1956, which the proponents of deintermixture had argued should have been taken on November 10, 1955.

[2] The implication which Sangamon seeks to leave (Sangamon Br. p. 36), that the construction which the Commission has thus placed on Section 307(b) has been applied nowhere "except central Illinois," is utterly fallacious. In addition to Springfield and Peoria, the Commission used the same approach in Elmira, N.Y., Evansville, Ind., originally in Albany-Schenectady-Troy, N.Y., and more recently in deleting operating V's in Fresno and in Bakersfield, Calif.

frequencies designed to render service "over an extended area and at relatively long distances" (Class I and Class II clear channel facilities); it set aside other frequencies designed "to render service primarily to a metropolitan district and the rural areas contiguous thereto" (Class III regional channels); and it set aside still other frequencies designed to "render service primarily to a city or town and the suburban and rural areas contiguous thereto" (Class IV local channels) (Rules 3.21-3.25). In that case, Huntington Park (with no AM station of its own) contended that it should receive a wide-coverage Class II facility under Section 307(b) of the Act in preference to Los Angeles (with a multitude of Class I, II, and III facilities). This Court agreed with the Commission that Section 307(b) of the Act did not compel a grant of a high-powered clear channel facility to Huntington Park, ahead of Los Angeles, even though Los Angeles already had some 15 or 20 high-powered operations. This Court there emphasized the fact that the applicant was requesting a type of facility generally reserved for a different type of community, instead of a Class IV facility normally intended for communities like Huntington Park.

Here, as a result of a long, involved general rule-making proceeding (Docket No. 11532), the Commission concluded in 1956 that in areas where UHF channels were providing satisfactory service, such areas should be served by UHF frequencies, and that areas which were receiving service on VHF (with little or no hope of UHF gaining a toehold) should be served by additional VHF allocations deleted from UHF areas. In other words, in Docket No. 11532 the Commission laid down certain basic allocation concepts, just as it did in the AM field when it adopted Rules 3.21-3.25. It concluded that a system of allocating TV channels on a nonintermixed basis would produce a more efficient and effective utilization of available spectrum space. Stated another way, the Commission in Docket No. 11532 specified the situations under which certain frequencies are to be utilized in one type of market, and other frequencies in a different type of market.

As in the Huntington case and by a parity of reasoning, cities like Springfield, which are obtaining excellent television service (both origination and coverage) on UHF and which will continue to receive such service on UHF if Channel 2 is deleted, cannot complain under Section 307(b) if facilities of another type (reserved for areas which are predominantly VHF) are utilized in St. Louis and Terre Haute. Thus, Sangamon's contrary contentions (Br. pp. 8, 9, 26, 27, 28-29, 38) that Springfield must have a first wide-coverage ("superior") VHF channel before larger markets like St. Louis may receive a fourth is completely undermined by the rationale of Huntington.[1]

In short, except for one matter yet to be considered, the arguments advanced by Sangamon are merely a repetition of those which this Court has previously rejected. Sangamon Valley Television Corp. v. United States, 103 U.S. App. D.C. 113, 255 F.2d 191 (1958).

The only new argument by Sangamon is its repeated references (pp. 10, 11, 12, 13, 19, 20, 37, 39, 40) to the recent so-called all-channel receiver legislation — without quite indicating whether it is contending that as a result of such legislation VHF and UHF can now live side by side (thus rendering deintermixture unnecessary), or whether Sangamon is arguing that Congress, in adopting such legislation, interdicted the action here challenged. Whichever be the thrust of Sangamon's argument, we subscribe to neither contention.

The ban imposed by the 1962 statute on the shipment in interstate commerce of sets not equipped to pick up both VHF and UHF signals does not become effective until May 1, 1964, and will not apply to sets theretofore manufactured nor to the more than 50 million VHF

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[1] Regarding Sangamon's contention that St. Louis has an "overabundance" of stations (Br. p. 43), the Court is no doubt aware that a number of markets not dissimilar to St. Louis in size likewise have four commercial VHF operations (Washington, Minneapolis-St. Paul, Dallas-Ft. Worth, Denver, Portland, San Antonio), not to mention larger communities like New York, Chicago and Los Angeles.

sets then in the hands of the public. Since many VHF-only sets in use when that ban becomes effective will still have an operating life of another six years or more, it will be 1970 or later (cf. Sangamon Br. p. 10) before UHF can hope to make much inroad into areas which presently receive the programs of all three networks on VHF. In the meantime, the differences in UHF and VHF coverage and the advertisers' preference for VHF cannot be ignored. Thus, for all practical purposes, if the Commission had activated a second wide-coverage VHF facility in central Illinois on July 20, 1962, ten days after the all-channel receiver legislation was enacted, the immediate consequences of such action on the number of UHF stations now operating in that area would have been no less disastrous than such action taken before the all-channel receiver legislation was enacted, a fact of which the Commission was well aware (23 RR 1579, 1590-1591, paras. 39-40).[1]

Seemingly cognizant of these matters (cf. Sangamon Br. pp. 9, 10, 27), the thrust of Sangamon's references to the all-channel receiver legislation seems to be for the purpose of persuading the Court that Congress interdicted the action here taken. Such is not the fact.

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[1] Undersigned intervenors have doubts whether the all-channel receiver legislation, without more, will provide a complete solution to many allocation problems which still face the industry. Whenever an AM receiver is out of repair, it picks up none of the 106 AM channels. Such is not the case with respect to the all-channel receivers provided for by recent legislation. Many things can go wrong with so-called "all-channel" TV sets where such sets will continue to bring in VHF but not UHF signals, making it unnecessary to call in a repairman to put the UHF end of the set back in working order. To make matters worse, such sets will need a special outside antenna for UHF signals, the cost of which many set owners will not incur so long as they can get the programs of all three networks on VHF stations operating in their general area. And where the market has at least three VHF signals and hence the programs of all three networks, the preference of the advertiser for wide VHF coverage facilities (where he has a choice) will make it difficult for a UHF station in an area so served to obtain or retain a network affiliation, and hence the programming, audience, and revenues needed to operate such a facility. Thus, the mere fact that all-channel receiver legislation has now been enacted does not mean, for the immediate future, that the TV allocation problems which have plagued the Commission since 1945 are magically about to disappear.

As heretofore noted, concurrently with its repudiation of intermixture in June of 1956, the Commission instituted 13 proceedings where it believed that the removal of a single V allocation would allow several U's to flourish. By 1960 (except for delays encountered in Springfield and Peoria) most of the markets where an ungranted V would be removed, and which stood a chance of becoming predominantly UHF, had already been deintermixed. It was at this juncture that the Commission began looking into a number of markets with a single operating V (and one or more UHF stations) — with a view to instituting proceedings to deintermix such markets to UHF. Eight such proceedings were begun (Hartford, Madison, Erie, Champaign, etc.) — in each instance involving a V which was actually on the air (cf. Sangamon Br. p. 39). Because of dislocations which would result, with many persons having installed costly equipment to receive such stations at a considerable distance, Congress indicated to the Commission that it should hold up actions looking toward the deletion of existing VHF operations and maintain the status quo, giving the all-channel receiver legislation then under consideration a fair trial.

Congress, in our view, did not by that action repudiate deintermixture as such. And as the Commission specifically pointed out to Congress in agreeing to a moratorium on proceedings to delete an operating VHF facility from markets with one or more UHF stations, action granting Channel 2 in Springfield where that channel had never provided a service would completely upset the status quo. In other words, the reasons which militated against removing an operating V (which Congress asked be held up in eight markets) similarly dictated, if status quo was the desideratum, that Channel 2 continue to operate in St. Louis and that it not be activated in Springfield. The legislative history cited by Sangamon cannot be tortured into meaning something different.

III

Commission Action Refusing to Shift Channel 2 from St. Louis to Salem-Rolla Was in the Public Interest

Petitioner 220 Television, Inc. (Case No. 17,356) is the licensee of Station KPLR-TV, which operates on Channel 11 in St. Louis without a network affiliation, as does the fourth commercial station in other similarly situated markets (e.g., Denver, Minneapolis-St. Paul, Dallas-Ft. Worth, San Antonio, Portland, Washington, etc.). And not unlike the fourth independently operated stations in those large markets, KPLR-TV has encountered difficulties during its first few years on the air in realizing a profit. Thus, understandably enough, 220 would like to operate as a network affiliate.

If Channel 2, on which Station KTVI-TV has operated in St. Louis since 1957 as an affiliate of ABC, was deleted from that market, 220 has good reason to believe that it could procure a network affiliation. Therefore, though not challenging the Commission's authority to remove Channel 2 from Springfield and shift it to Terre Haute, 220 argues that whether Channel 2 remains in Springfield or is shifted to Terre Haute, it should in any event be allocated to Salem-Rolla and not to St. Louis (220 Br. p. 10, fn. 13). And by way of gilding the lily, 220 states that it is prepared, if Channel 2 is assigned to Salem-Rolla, to put such a facility on the air (220 Br. p. 11) — while at the same time hanging onto Channel 11 which would thereupon become, as a network affiliated station, a valuable property in St. Louis.

In some respects to no less a degree than Sangamon, 220 argues for a mechanical application by the Commission of Section 307(b) of the Act. Because Salem-Rolla has no VHF assignment of its own, it must receive a V before multiple stations can be assigned elsewhere, or so goes 220's argument. Such a contention ignores the indisputable fact that, with only 12 channels to work with, it is not possible to allocate a VHF channel to every town, village, and hamlet in the United States.

It was for that reason, inter alia, that 70 UHF channels were added to the television band in 1952. It was for like reasons that the Commission's AM rules for more than 25 years have provided for Class III regional channels (with powers up to 5 kw) for large metropolitan areas, and for Class IV local channels (with 250 watts of power) for smaller cities and towns. See Huntington Broadcasting Co. v. Federal Communications Commission, 89 U.S. App. D.C. 222, 192 F.2d 33 (1951).

220's argument, if carried to its logical conclusion, would mean, for example, that one of the four VHF channels which have been on the air in Washington for ten years or more should at the behest of anyone who elects to invoke Section 307(b) be shifted to Laurel, Md. or to Fairfax, Va., so that those communities can have a station of their own. Carried still further, the same argument could be made with respect to the third and to the second long-time VHF operations in Washington, D.C.

The fact that the phenomenal growth of television since 1948 is in large part due to the programming provided by the networks, that advertisers who sponsor costly network shows want exposure in the major markets, that sponsors are not interested in a network which can not obtain exposure in such markets equal to that of the other two, and that multiple equally competitive services in the major markets are therefore a sine qua non, would be matters which 220 would have the Commission ignore in devising a "fair, efficient, and equitable" allocation of television service and in encouraging the "larger use" of radio (47 U.S.C. Secs. 303(g) and 307(b)).

During the six years which KTVI-TV has operated on Channel 2 in St. Louis, as an ABC affiliate, the people in that large metropolitan area have come to depend on the service provided by that station. Since 1959 they have come to depend on KPLR-TV which provides a type of service not available on the other three commercial stations in St. Louis.

220, in asking that Channel 2 be shifted to Salem-Rolla, would thus in effect deprive some three million people in the St. Louis area of an independent service to which they have become accustomed. For what? So that Salem-Rolla, with a combined population of less than 15,000, will have a VHF outlet of its own. True, 220 gives lip service to outlying populations. But those outlying populations will not receive a transmission service by allocating Channel 2 to Salem-Rolla. They already have signal coverage, as evidenced by set saturation data for the entire area which a VHF station operating out of Salem-Rolla would serve. And as the Commission noted, if a VHF station were allocated to that area, a monopoly situation would be created, inasmuch as a second or third VHF channel for that region is in no sense feasible.

Thus, it is readily apparent that the type of question here involved, whether one of the ten largest metropolitan areas in the country should continue to have an independent (non-network) service which it has had for a number of years, in preference to providing a first mouthpiece on VHF for a community of less than 15,000 "is precisely the sort of question which Congress, by employing the broad language of Section 303, wished to commit to the discretion of an expert agency, not the courts." Coastal Bend Television Co. v. Federal Communications Commission, 98 U.S. App. D.C. 251, 255, 234 F.2d 686 (1956).

CONCLUSION

Undersigned intervenors accordingly submit that the July 20, 1962 Report and Order should be affirmed.

Respectfully submitted,

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March 19, 1963

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,356

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220 TELEVISION, INC.,

Petitioner,

v.

UNITED STATES OF AMERICA
and the
FEDERAL COMMUNICATIONS COMMISSION,

Respondents,

AMERICAN BROADCASTING-PARAMOUNT THEATRES, INC.,
SIGNAL HILL TELECASTING CORPORATION,

Intervenors.

On Petition for Review of a Report and Order
of the Federal Communications Commission

PETITION OF 220 TELEVISION, INC.
FOR REHEARING EN BANC

On June 27, 1962 a panel of this Court handed down an opinion on the consolidated proceeding which included this case and Case Nos.

17,279 and 17,380.[1/] These cases arose from the decision of the Federal Communications Commission to assign television Channel 2 to St. Louis, Missouri, and Terre Haute, Indiana, rather than to Springfield, Illinois, and its refusal to assign Channel 2 to the area of Salem and Rolla, Missouri, rather than St. Louis. An assignment to the Salem-Rolla area could have been made consistent with an assignment to either Springfield or Terre Haute. With Judge Wright dissenting, a majority of the panel[2/] affirmed these Commission determinations.

In this petition for rehearing en banc we confine ourselves to the one point which the majority said "troubled" them (Slip op., p. 14). This was the Commission's reliance in deciding the merits of the case upon the fact that a television station had been permitted temporarily to make use of the channel in St. Louis, pending the outcome of the case. Thus, in retrospect it turned out that the temporary authorization weighted the Commission's judgment in favor of making a permanent assignment to St. Louis.

In 1957 when the Commission first attempted to move Channel 2 from Springfield to St. Louis it also granted special authorization to

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1/ These were Fort Harrison Telecasting Corporation v. Federal Communications Commission (Case No. 17,279) and Sangamon Valley Television Corporation v. Federal Communications Commission (Case No. 17,380).

2/ The panel consisted of Chief Judge Bazelon and Circuit Judges Washington and Wright.

Signal Hill Telecasting Corporation (Signal Hill) to operate its station KTVI on Channel 2 in St. Louis. The channel allocation proceeding was later nullified by reason of ex parte representations which had been made to the Commission, notably by the president of Signal Hill, but to avoid dislocation and loss of service pending a final determination on the merits of the channel allocation question station KTVI was permitted to remain on Channel 2 in St. Louis.

Consequently, when in 1962 in the "entirely new proceeding" it had been instructed by this Court to conduct "to determine where and to whom VHF Channel 2 should be assigned" (see Slip op., pp. 5-6), the Commission made the determinations here under review, station KTVI had been on Channel 2 for five years. In deciding that the channel should be allocated to St. Louis rather than elsewhere, including the Salem-Rolla area as proposed by 220 Television, Inc., the Commission relied heavily upon the fact that station KTVI had been in operation in St. Louis and thus providing a service there. The Commission's opinion included the following statements on this point:

> " . . . Channel 2 is now providing a needed service to the public in the St. Louis area; and it will shortly provide Terre Haute with a needed second local VHF service . . . In these circumstances, there would have to be strong countering public interest considerations to lead to a conclusion to use Channel 2 at Springfield at this time" (R. 640).

* * * * * * *

"As a by-product of not using Channel 2 at Springfield, the channel may continue to be used at St. Louis to provide that area with a fourth commercial VHF local service. It may also be used to provide Terre Haute with a second local VHF service, thus creating practical opportunities for the public in both of these VHF areas to have a greater choice of competitive television service. The channel could also be used in the Rolla-Salem area, if not used at St. Louis, to provide that area with a first VHF service. We believe, however, that public interest considerations require the continued use of Channel 2 at St. Louis" (R. 641; emphasis supplied).

* * * * * * *

"The competitive service provided by Station KTVI for the last five years in the [St. Louis] area would also, it is apparent, create a great void if deleted. Thousands of people in both Illinois and Missouri depend upon it for a choice of television service" (R. 644).

* * * * * * *

"An additional and important consideration [against assigning Channel 2 to Salem-Rolla] is that Channel 2 could not be used in the Salem-Rolla area without depriving a large area and population in Illinois and Missouri of a needed competitive service which they have been receiving for the past five years from the Channel 2 station in St. Louis" (R. 646).

* * * * * * *

"We are of the view that the continued use of Channel 2 at St. Louis instead of in the Rolla-Salem area thus serves the public interest and this objective" (R. 646; emphasis supplied).

There was no suggestion that the persons who would be served by the station if it were assigned to Salem-Rolla would not also come to rely upon the service of that station. In fact, as the majority

opinion states (Slip op., p. 12), the proposal for the assignment of Channel 2 to Salem-Rolla "was endorsed in numerous letters from local residents, organizations and public officials of communities in the Rolla-Salem area."

In affirming the Commission despite its reliance upon the existing service of KTVI the majority opinion said that (Slip op., p. 14):

> "We are troubled by this line of reasoning. Temporary authorizations for station operation granted by the Commission should not be made the basis of preferring the holder of the authorization over other competing applicants for a permanent license. Similarly, where cities are competing for channel allocations, a temporary allocation to one city rather than another should not operate to create vested rights. But each situation of this sort must be judged on its own merits, and we are satisfied that the Commission's conclusions here are adequately buttressed by the other grounds on which it relied."

But here the Commission has not said in its opinion that it would have reached the same determination if no consideration had been given to the presence of KTVI on the channel in St. Louis, and it can hardly be supposed that it repeatedly stressed this factor if it was not of considerable and, for all anyone can tell, decisive importance. For there has never been a suggestion that the Commission could not in its broad discretion under the Communications Act have lawfully decided to make the allocation to Salem-Rolla.

We submit that the very breadth of the Commission's discretion requires that it be compelled expressly to limit its consideration exclusively to matters which are proper for its reliance and that it should be instructed to consider the matter anew without regard to the existence of station KTVI, rather than being affirmed apparently on this Court's assumption that elimination from consideration of this important factor would not have changed the Commission's judgment.

The majority opinion has implications far beyond this particular case or even this particular Commission. As we understand the first part of its holding it is that in rule making as in adjudication interim grants of authority pending final decision should not be permitted to weigh in the agency's judgment at the time of final decision so as to prevent competing proposals from being given full and fair consideration. This is the position we have urged, and we submit that it follows from the line of doctrine which began with Ashbacker Radio Corp. v. Federal Communications Commission, 326 U.S. 327 (1945), and which had perhaps its most notable recent expression in Community Broadcasting Co. v. Federal Communications Commission, 107 U.S. App. D.C. 94, 275 F.2d 753 (1960).

But then the majority has gone on to say in substance that an agency decision will be affirmed even if substantial reliance has been placed upon the fact of a prior interim grant so long as the

record on appeal reflects sufficient other support for the agency decision. In other words the agency may make a biased judgment because it was influenced by matters -- such as the temporary operation here -- that it should not have considered. It will nevertheless be affirmed so long as its judgment could lawfully have been reached in the absence of bias.

We do not believe that this was intended by the majority of the panel, but we submit that this is the necessary effect of its holding on this point. We urge that rehearing be granted so that the position of this Court as a whole can be made clear as to the weight agencies such as the Commission can ascribe to the grant of temporary authorizations made pendente lite when they come to the merits.

If agencies must, as we have urged, disregard insofar as it is humanly possible the fact that they have made a temporary grant, this should be made clear and the instant case should be remanded to the Commission for consideration in that light. On the other hand, if temporary operation is to be allowed as a factor to consider on the merits, then this, too, should be expressly stated, so that agencies and reviewing panels of this Court will be guided accordingly when, for example, they consider petitions for orders staying construction or operation pendente lite. Agencies and this Court might well be inclined frequently to grant stays if to deny them would be to permit a substantial prejudgment of the merits.

Certificate of Counsel

Undersigned counsel for petitioner hereby certify that this petition for rehearing en banc is presented in good faith and not for delay.

Respectfully submitted,

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July 11, 1963

CERTIFICATE OF SERVICE

I hereby certify that true copies of the foregoing "Petition of 220 Television, Inc. for Rehearing En Banc" have been sent by first class United States mail, postage prepaid, this 11th day of July, 1963 to each of the following:

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,356

220 TELEVISION, INC.
Petitioner

v.

UNITED STATES OF AMERICA and the FEDERAL COMMUNICATIONS COMMISSION
Respondents

AMERICAN BROADCASTING-PARAMOUNT THEATRES, INC.
SIGNAL HILL TELECASTING CORPORATION
Intervenors

No. 17,380

SANGAMON VALLEY TELEVISION CORPORATION,
Petitioner

v.

UNITED STATES OF AMERICA and the FEDERAL COMMUNICATIONS COMMISSION
Respondents

STATE OF ILLINOIS, ET AL
Intervenors

Answer of Signal Hill Telecasting Corporation to Petitions for Rehearing

These cases involve the validity of a Report and Order of the Federal Communications Commission issued July

20, 1962 which "deintermixed" Springfield, Illinois by deleting VHF channel 2 from that city, so as to make it an all-UHF community. "As a by-product of not using Channel 2 in Springfield" (J. A. 321), the Commission assigned the channel to St. Louis, Missouri and Terre Haute, Indiana. It refused to assign the channel to Rolla, Missouri on the ground that (J. A. 327)

> "the assignment of Channel 2 to this [Rolla] area would virtually insure the establishment of a one station monopoly in a wide area which must look to UHF for local outlets and services."

A panel of the Court affirmed the decision of the Commission to delete Channel 2 from Springfield, and to assign the channel to St. Louis rather than to Rolla. Judge Wright dissented solely as to the deletion of Channel 2 from Springfield, on the ground that it was arbitrary to deintermix that city while "abandoning" deintermixture elsewhere. He did not dissent from the decision that, if Channel 2 were deleted from Springfield, it should be assigned to St. Louis rather than to Rolla.

In his opinion Judge Washington also found that the Commission's conclusions appeared to be predicated to "some extent" on the fact that Channel 2 was already being used in St. Louis. He stated that "a temporary allocation to one city rather than another should not operate to create vested rights" (Slip Opinion, p. 14). However, he found, in effect, that this was harmless error, stating (ibid):

> "But each situation of this sort must be judged on its own merits, and we are satisfied that the Commission's conclusions here are adequately buttressed by the other grounds on which it relied. Under the circumstances, we do not believe we would be justified in setting aside the Commission's action because it relied in part on the line of reasoning here under discussion."

QUESTIONS PRESENTED

In their petitions for rehearing, the parties make three chief contentions:

1. That the Court should have held that the Commission was arbitrary in deintermixing Springfield while abandoning deintermixture elsewhere.[1]

2. That the Court should have held that Sec. 307 (b) requires that there be equality in the allocation of VHF channels, as such, and that it is not sufficient that there be an equitable allocation of all types of television service, whether UHF or VHF.[2]

3. That the Court erred in not vacating the Commission's order because of the findings as to interim service in St. Louis, even though the Commission's conclusions were "adequately buttressed by the other grounds on which it relied."[3]

We submit, for the reasons stated below, that the decision of the panel, both as to Springfield and Rolla, was sound and that there is no reason for a rehearing as to any of the three questions raised in the petitions for rehearing.

ARGUMENT

I.

The Commission Was Not Arbitrary in its Decision to Deintermix Springfield While Discontinuing the Eight Deintermixture Proceedings Begun on July 27, 1961.

Sangamon Valley and the State of Illinois argue that the Commission Order violated Section 307 (b)

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[1] Petition of Sangamon Valley, p. 4

[2] Petition of State of Illinois, p. 4 et seq.

[3] Petition of 20 Television, Inc., passim; Petition of Sangamon Valley, p. 9 et seq.; Petition of State of Illinois, p. 3

> "because it discriminates against Springfield and the State of Illinois by attempting to apply 'deintermixture' there at a time when the Commission had essentially abandoned deintermixture as an aid to the development of UHF." (Sangamon Petition, p. 4; similarly, State of Illinois Petition, p. 3)

It was on this point that Justice Wright dissented. He argued that the Commission moratium on eight new selective deintermixture proceedings, following enactment of the all-channel receiver legislation, was so inconsistent with its decision to proceed with the Springfield proceedings as to be arbitrary.

However, the eight deintermixture cases for which the moratorium was adopted, had only been begun in July 27, 1961 and involved the proposed deletion of VHF channels *already in use.* The Springfield proceedings, on the other hand, had been pending since before 1957 and involved the proposed deletion of a VHF channel that *had never been used.* This distinction was explained to the House Committee considering the all-channel receiver legislation. The Commission stated that, if the all-channel receiver legislation were enacted, it would be inappropriate to proceed further with the eight new deintermixture proceedings, involving as they would the dislocation of VHF services already on the air. But the Commission explicitly advised the Committee that this moratorium would not apply to four pending deintermixture proceedings, including Springfield. (H. R. Rep. No. 1559, 87th Cong. 2d Sess. pp. 22, 23).

Referring to the foregoing legislative history, Judge Washington said (p. 11):

> Nor do we think it arbitrary to deintermix Springfield, even though deintermixture proceedings are in general being held in abeyance, pending results under the new all-channel legislation mentioned above. *The Commission notified Congress that the Springfield case would be one of four proceeded with be-*

> *cause it would not involve any dislocation or disruption of existing service in the areas involved.* As we pointed out in WIRL Television Co. v. United States, supra at 344, 253 F. 2d at 866, with respect to deletion of a VHF channel and substitution of two UHF channels at Peoria, Illinois, in similar circumstances, the long range goal of the Commission —which is reflected in the legislation—is to encourage UHF. *As Springfield has never made use of VHF Channel 2, it is not arbitrary, as it was not in WIRL, to conclude that the goal will be better approached "by allotting it four technically equal UHF channels rather than one superior VHF channel and two inferior UHF channels."* (emphasis supplied)

We submit this conclusion to be eminently sound, particularly in light of the findings that a VHF station at Springfield "would have a blighting effect on existing UHF stations and on UHF developments in the near future".[4]

II.

Section 307 (b) Does Not Require That There Be Equality in the Allocation of VHF Channels, as Such, and It Is Sufficient That There Be an Equitable Allocation of All Types of Television Service, UHF Service, Whether UHF or VHF.

The State of Illinois complains that the Commission considered only the relative needs of Springfield and St. Louis and ignored that part of Section 307 (b) which

> "requires a fair and equitable distribution of frequencies among the several *states* as well as communities" (emphasis as in Petition for Rehearing, p. 4)

It argues that Springfield is "the state capital" (ibid, p. 6); that the UHF station established in 1953 (WICS)

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[4] See discussions *infra* on page 6 at footnotes 5 and 6 showing the multiple UHF services now in the Springfield area that would be blighted by a VHF station.

"has been and remains Springfield's only station" (ibid, p. 5); and that a VHF station would give wider coverage than UHF stations, so that "the removal of Channel 2 from Springfield means that countless thousands of people residing in Southern Illinois will never receive Illinois originated programming." (Ibid, p. 6)

But, the Commission found that a VHF station on Channel 2, though having a wider coverage than any single UHF station could have, "would have a blighting effect on existing UHF stations and on UHF developments in the near future" (J. A. 319); that, in addition to WICS (the UHF station already in Springfield proper) competing applications were pending for a *second* UHF Springfield station;[5] and that there were *other* multiple UHF services from Decatur and Peoria presently serving all or portions of the Springfield area.[6]

After reciting these and related facts, the Commission considered the "area coverage" argument in the following finding (J. A. 318):

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[5] Finding 21, J. A. 311: "The record indicates that since 1957, even though the possibility of the activation of Channel 2 at Springfield has remained in question and despite VHF service in the Springfield area from Station WCIA at Champaign, UHF development has not remained static in the Springfield area. While no additional UHF outlets have yet been established in Springfield itself, competing applications have been tendered for Channel 26 at Springfield. Finalization of that assignment in this proceeding will make it possible to go forward with their consideration."

[6] Finding 19, J. A. 311: "*UHF outlets in area.* The existing pattern of television service in the Springfield area is, as it was in 1957, predominantly UHF. Two UHF stations have been providing service to the immediate Springfield area since 1953—Station WICS on Channel 20 at Springfield and Station WTVP on Channel 17 at Decatur, Illinois, approximately 37 miles east of Springfield. Three other UHF stations (WEEK-TV, Channel 43; WTVH, Channel 19; and WMBD, Channel 31) at Peoria, about 58 miles to the north of Springfield, serve portions of the Springfield area. Station WMBD has been on the air since April of 1959; the other Peoria stations since 1953."

"38. *Coverage Consideration.* Sangamon and the State of Illinois feel that Channel 2 should be used at Springfield because it can achieve a greater area coverage than a UHF station. This is an advantage at this stage of the art. It is not, however, necessarily controlling. UHF can partially overcome it and provide adequate coverage by increases in power and height. It can extend its coverage also, and is doing so in the Springfield area and in other areas, by the use of boosters, translators and satellite stations. In addition, the more plentiful supply of UHF channels makes it possible for multiple UHF stations to serve a greater area and population than a single VHF station and, in addition, provide more communities within the area with local outlets and a choice of programming. *In any event, we do not believe this is an overriding public interest consideration in light of the deterioration in quality and quantity of existing UHF service in the Springfield area which may be reasonably expected to result from the establishment of a VHF station at Springfield. A much greater area and population in the immediate Springfield area would stand to lose rather than to gain service, in our judgment, if Channel 2 were used at Springfield.*" (Italics supplied)

This analysis, we submit, disposes of the argument that, because of its wider area coverage, a VHF service would *per se* be in the public interest of the State of Illinois, as distinguished from the community of Springfield, despite its adverse effects on potential and existing multiple UHF service. Certainly, the State of Illinois as a whole would not benefit, any more than would the community of Springfield, from wider VHF coverage on one channel, reaching into southern Illinois, paid for only by the blighting of the present multiple UHF services that now reach all or portions of the Springfield area itself, as well as the blighting of future additional service.

For, as Judge Washington pointed out in his opinion, Section 307 (b) does not require that the relative needs of two communities be determined solely on the basis of

VHF or any other particular type of station. As the Court said, after quoting from *Federal Radio Commission* v. *Nelson Bros. Co.*, 289 U. S. 266 (Slip Opinion, p. 8):

> "so long as the television transmission service allocated to a community, *whether it be solely VHF, UHF, or a combination of both*, is determined on the basis of relative need, amounts to a fair and equitable distribution of service for that community, in relation to others, and gives efficient service to the community, the standard set out in Section 307 (b) is fully met." (italics supplied)

Sangamon Valley argues, however, that Judge Washington misread the *Nelson Bros.* case, in that said case involved merely different classes of AM radio stations, i.e., "clear," "regional," and "local," and not different classes of TV stations, i.e., "UHF" and "VHF" (Sangamon Petition, pps. 6, 7).

But, the basic principle of the *Nelson Bros.* case would seem sound, that

> "the Commission was entitled and required to consider *all* the broadcasting facilities assigned to the respective states." (see quotation from *Nelson Bros.* case in Judge Washington's opinion, p. 7)

And, as narrated in detail in the majority opinion, the Commission here had adequate grounds in the record for concluding that "a theoretically feasible VHF assignment at Springfield . . . would have the result, at least for the forseeable future of destroying or inhibiting service in either or both the Springfield and St. Louis areas and of limiting opportunities for the growth of a greater number of television outlets and services in Springfield." The Court also noted (p. 9) that "In deciding upon a final pattern of assignments for Springfield and the other communities it [the Commission] took into account the public interest, the inferior competitive position of UHF in a VHF market, the competitive effect of Channel 2 in each of the communities before it, so called 'white areas'

(areas which would be without service), the greater coverage given by VHF, and the satisfactory service being given by UHF in Springfield."

Accordingly, we submit that there is no basis for a rehearing of the Court's decision that the Commission decision had "a reasonable factual and legal basis." (Opinion, p. 10)

III.

The Court Did Not Err in Holding That the Commission References to Interim Service in St. Louis Were Harmless Error.

220 Television urges a rehearing on the ground that the Court should have held that, if the Commission gave any cognizance whatsoever to the existence of interim service in St. Louis, its decision must be vacated and the case remanded for reconsideration.

But this argument overlooks the doctrine of harmless error. Under Section 10 of the Administrative Procedure Act, 5 U. S. C. 1009 (e), "the reviewing court shall review the whole record . . . and due account shall be taken of the rule of prejudicial error."

The Court did precisely this. Reviewing the whole record, and particularly the Commission's findings (Slip Opinion, p. 13) that

> "the assignment of Channel 2 to the [Rolla] area would virtually establish a one station monopoly and that the use of UHF in the area would provide opportunities for a greater number of local outlets and choice of services"

the Court held that the reference to the interim service in St. Louis was harmless error, since, in Judge Washington's words (Slip Opinion, p. 14),

> "The Commission's conclusions here are adequately buttressed by the other grounds on which it relied."

The situation is analogous to that in *Triangle Publications, Inc.* v. *Federal Communications Commission*, 110 U.S. App. D.C. 432, 291 F. 2d 342. There, the Commission had erroneously failed to consider certain relevant facts but the court nevertheless held that, under all the circumstances, such failure was not fatal to the validity of the Commission's action. Judge Fahy said (at p. 345):

> "We may well regard the failure of the Commission explicity to weigh this matter as depriving its decision of some higher quality it might have achieved. It is the sort of omission which in some circumstances might be fatal to the validity of Commission action. We do not attach that effect to it in this case because the omission to consider this phase of the situation does not bear sufficiently upon the heart of the matter, which, as disclosed by the full discussion of the facts in the Commission's decision, was the desire of the Commission to maintain the 'delicate balance in the distribution of services that we have so carefully allocated for this area.'"

So, here, the references to the interim service in St. Louis did not bear upon the heart of the Rolla problem which, as pointed out by Judge Washington, was the Commission's findings that the assignment of channel 2 to Rolla "would virtually establish a one station monopoly" whereas the use of UHF in the area "would provide opportunities for a greater number of local outlets and choice of services." In short, while under other circumstances, it might have been reversible error for the Commission to take cognizance of the interim service, it was harmless error here considering the whole record and the other grounds on which the Commission relied.

This is equally clear as to Springfield. Though Sangamon Valley and the State of Illinois assert[7] that the Commission decision was based "in major part" or "pri-

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[7] Petition of Sangamon Valley, p. 10, and Petition of State of Illinois, p. 3

marily" on the fact of interim use in St. Louis, the record does not bear this out. While the Commission adverted to the dislocating effects on St. Louis of using Channel 2 in Springfield, its primary concern was the dislocating effects on Springfield of using Channel 2 there (J. A. 319, 320), and the decision to delete Channel 2 from Springfield was based not on the advantages of using it in St. Louis, but rather on the disadvantages of using it in Springfield.[8] In fact, only after concluding that Channel 2 had to be deleted from Springfield to assure multiple services there, did the Commission add that (J. A. 321, ¶42):

> "*As a by-product of not using Channel 2 at Springfield*, the Channel may continue to be used at St. Louis to provide that area with a fourth commercial VHF local service. It may also be used to provide Terre Haute with a second local VHF service . . ." (emphasis supplied)

Accordingly, as in the case of Rolla, Judge Washington was amply justified in deciding that the finding as to the interim service to St. Louis on Channel 2 was harmless error, and that the Commission's ultimate conclusion was "adequately buttressed by the other grounds on which it relied." Sec. 10, Administrative Procedures Act, *supra; Triangle Publications, Inc.* v. *Federal Communications Commission, supra.*

In conclusion, it should be noted that the several pejorative references to ex parte presentations in the Petition for Rehearing of the State of Illinois[9] are quite irrelevant. After a full evidentiary hearing these presenta-

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[8] The findings of the Commission as to the "blighting effect" of a VHF station in Springfield on existing and future UHF operations in that area are discussed *supra* on page 6 at footnotes 5 and 6.

[9] The State of Illinois Petition refers to "massive ex parte influence", "aggravated improper attempts to influence," (p. 2) and "Signal Hill's multiple ex parte blandishments" (p. 7).

tions, though held to require a new proceeding, were found not to involve the disqualification of any party or any Commissioner.[10]

CONCLUSION

Accordingly, the petitions for rehearing should be denied.

Respectfully submitted,

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[10] After a full evidentiary hearing on the ex parte issues, Judge Horace Stern, special hearing examiner, found that the presentations made by Signal Hill were made "in the honest belief that there was nothing illegal or improper in so doing in a rule-making proceeding, a view more or less generally held at the time by members of the industry, by other interested parties, by public officials, and apparently by lawyers as well." 19 Pike & Fischer RR 1055, 1073 (March 11, 1960). The Commission later adopted his conclusion that no member of the Commission was disqualified to participate in the further proceedings and that the conduct of no party was such as to disqualify it. 19 Pike & Fischer RR 1055. This Court in its decision of July 27, 1961, held it "unnecessary for the Commission to reconsider the conclusion . . . that no Commissioner is disqualified and no party is absolutely disqualified." 117 U. S. App. D. C. 113, 294 F. 2d 742.

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